Supreme Court, U.S.
FILED

03-993 DEC 30 2003

No. ~~OFFICE OF THE CLERK~~

In The

Supreme Court of the United States

WARREN R. FOLLUM,

Petitioner,

v.

UNITED STATES OF AMERICA
and
COMMISSIONER OF INTERNAL
REVENUE SERVICE

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under one of the statutory exceptions to 26 USC § 7421(a) of the Internal Revenue Code (IRS) and / or under the judicial exception of the Enochs v Williams Packing Co. 370 US 1, the IRS is barred from seizing a taxpayer's property without prior notice under 26 USC §§ 6303(a) and / or 6330 and whether a timely filing of a Collection Due Process notice under 26 USC § 6320 of the Internal Revenue Code bars the IRS from seizing a taxpayer's property without judicial action for collection.

2. Whether the lower court's action, in denying the petitioner motion for a injunction, violated the petitioner's rights to a full and fair opportunity to be heard under Equal Protection Guarantee and Due Process Clauses of the Fifth Amendment, when the lower courts ignored the procedural requirements of Federal Rules of Civil Procedures, Rules 8(a)(2), 10(c), 12(b)(1), 12(b)(6) and 56, in their determination to dismiss the petitioner's complaint.

3. Whether, the IRS violated the petitioner's Fourth and Fifth Amendments rights, when the IRS seized the petitioner's property without first providing the petitioner with the statutory notice requirements mandated by Congress under 26 USC §§ 6303 and 6330.

PARTIES TO THE PEOCEEDING

Petitioner is Warren R. Follum. He is the plaintiff in the District Court and the appellee in the Court of Appeals. He brings this action on his own behalf.

Respondents are the United States of America and the Commissioner of the Internal Revenue Service. They were defendants in the District Court and appellants in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App. at 1a) is unpublished. The decision of the District Court for the E.D.N.C. (App. at 3a) is reported at 91 AFTR.2d 1938.

JURISDICTION

The judgment of the Court of Appeals was entered on 7 October 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY and RULE PROVISIONS INVOLVED

Pertinent provisions of the Fourth and Fifth Amendments of the United States Constitution, and of the Federal Rules of Civil Procedures (FRCP) under Rules 8(a)(2),10(c),12(b)(1),12(b)(6) and 56, and of the Internal Revenue Code (IRC) under Sections 6303(a), 6320, 6330,7421(a), 7491 and the Administrative Procedure Act under 5 USC § 706 are set forth at pages 67a-89a of the appendix to this petition.

STATEMENT OF THE CASE

This case presents questions about what constitutes a compelling government interest to seize private property of a citizen of our democratic society for the payment of alleged tax liabilities when the IRS has not complied with the statutory scheme mandated by

Congress. The Second, Third, Fifth, Sixth, Ninth and Tenth Circuits, have made it clear that before the Internal Revenue Service (IRS) can assert their awesome power of administrative lien and/or levy, the IRS must comply with 26 USC §§ 6203, 6212 and 6303(a). The Fourth Circuit decision in the instant case is in direct conflict with the decisions of her sister circuits. This split between the circuits, on this issue is of profound national importance in the collection of alleged tax liabilities by the IRS. In the instant case the IRS failed to provide the petitioner with either notices under 26 USC §§ 6303(a) and 6330.

Even assuming "seizing of private property without statutory authority" to be of a compelling government interest, this case presents questions that such administrative seizures of private property has no place in a free democratic society and that no administrative policy can be tolerated in a free society that allows a government agency to place a lien and/or levy on private property without adhering to the precise strictures imposed by Congress. See Thatcher v. Powell, 6 Wheat 119, 125, 5L. Ed (1821). The legitimacy of allowing the government to seize and sell property prior to adjudication has long depended on strict compliance with the procedures prescribed by law. As Chief Justice John Marshall stated: a fundamental principle of our nation's jurisprudence is a citizen's right to enjoy what is his without undue interference by the government and the failure of the person invested with such power to seize another's property must pursue with precision the course prescribed by law, or his act is invalid. The lower court's decision is an extraordinary departure from these fundamental principles.

And whether the IRS departure from the statutes imposed by Congress for the collection of alleged tax liabilities constitutes a violation of a taxpayer's fundamental Constitutional rights under the Fourth and Fifth Amendments.

I. FACTUAL BACKGROUND

The present dispute between the petitioner and the Commissioner was initiated by the Internal Revenue Service (IRS) when the IRS sent the petitioner's employer North Carolina State University (NCSU) a Federal Tax Levy on 17 May 2002. The IRS alleges that the petitioner has alleged tax liabilities for tax years 1990, 1991, 1992 and 1993. The levy notice was sent from the IRS Automated Collection Service (ACS) Office in Kansas City, Mo.. The University did not respond to this levy, because of a misunderstanding with the verbiage within the levy notice and the levy occurred after the University had closed its payroll books for issuing the May 2002 payroll checks. A second levy notice was issued to the University by the IRS on 21 August 2003, which the University did respond to.

It is undisputed by the parties involved that the petitioner received a Federal Tax Lien Notice and right to a 26 USC § 6320 Collection Due Process (CDP) Hearing for alleged tax liabilities for tax years 1990, 1991, 1992 and 1993 and the petitioner timely filed the 26 USC § 6320 CDP hearing request with the IRS on 13 September 2002[1].

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[1] The Petitioner currently has a petition for lien and levy action under 26 USC §§ 6320 and 6330 pending before the United States Tax Court Docket No. 7936 - 03 L for these alleged tax liabilities.

II. PROCEEDINGS BELOW

On the 4 November 2002, the petitioner, filed in the United States District Court for the Eastern District of North Carolina (EDNC), Western Division a complaint against the respondent seeking a temporary restraining order and preliminary injunction from the wrongful lien and seize of the petitioner's property with respect to tax years 1990, 1991, 1992 and 1993. The basis of the complaint, as stated by the petitioner was that the petitioner had filed a CDP hearing request under 26 USC § 6320 and that the IRS had failed to provide the petitioner with the Congressional mandated notices under 26 USC § 6303(a) and 26 USC § 6330 (App at 90a-93a). The District Court had jurisdiction under the 26 USC § 6330(e) exception to 26 U.S.C. § 7421(a), and the Enochs v Williams Packing Co., 370 US 1 to hear the petitioner's complaint.

On 12 November 2002, the District Court denied the petitioner's motion for a temporary restraining order.

On 9 December 2002, the respondent filed a motion to continue the hearing. The District Court granted the motion.

On 31 December 2002, the Commissioner served and filed a motion to dismiss pursuant FRCP 12(b)(1) and 12(b)(6). Motions to dismiss on the pleadings, pursuant FRCP 12, are often confused with each other. It is frequently unclear whether the lower courts dismissed under Rule 12(b)(1) or 12(b)(6), and even more importantly whether, it was a 12(b)(6) proceeding, where outside matters were considered, thus converting the procedure into a Rule 56 summary judgment. The differences among these procedures are vital, especially when the claims subject to dismissal arises under 26 USC §§ 6303(a), 6320 and 6330, and effects the fundamental rights of taxpayers national, when a taxpayer files a complaint in federal district court for wrongful lien and / or levy action by the IRS.

The Commissioner made only a good faith allegation in her motion to dismiss that she had sent the petitioner the 26 USC § 6330 CDP hearing notice on 29 December 2000. This good faith allegation by the Commissioner is not evidence that the 26 USC § 6330 notice was sent. The respondent offered no substantive evidence to support her claim. The respondent had the burden of producing evidence sufficient to enable the jury, acting reasonably, to find the existence that the section 6330 CDP hearing notice was sent to the petitioner. The fact is, the Respondent offered no evidence at all to support her claim. Fairness requires that the party with superior access to proof of the alleged fact to come forward with that proof (Chicago & NW Ry. Co., v. CC Whitnack Produce Co., 258 US 369; McCormick on Evidence, note 54 § 343 at 454). The evidence in question would consist of a certified copy of the Certificate of Assessments, Payments, etc (IRS Form 4340) and/or the U.S. Postal Service return mail receipt (USPS Form 3811) that Congress has mandated that the IRS send with the section 6330 CDP hearing notice. The failure of the Commissioner to come forward with this minimal evidence in support of her affirmative defense should have required the lower court to dismiss the respondent's motion to dismiss the petitioner's complaint and grant the petitioner's motion for injunctive relief under the section 6330(e) exception to 26 USC § 7421(a).

FRCP 12 provides the respondent with an affirmative defense for the lower courts to dismiss the plaintiff's complaint for either lack of subject matter jurisdiction and / or failure to state a claim that relief could be granted. American jurisprudence to procedural fairness and / or Rule 56 requires that all parties be given a reasonable opportunity to present all material pertinent to such motion to show the court that there is a genuine material issue for trail. Pursuant EDNC local Rule 4.05, the return date for the petitioner's reply to the respondent's motion to dismiss was 29 January 2003.

On 24 January 2003, the lower court held a hearing regarding the parties' motion. Also, the petitioner served and filed his reply. The petitioner's reply contained clear and convincing evidence that the Commissioner did not properly mail the petitioner the 26 USC § 6303(a) notice as mandated by Congress (App. at 94a-99a). And the petitioner provided by a preponderance of evidence that the IRS's good faith allegation that she had properly mailed the petitioner the Congressional mandated 26 USC § 6330 Collection Due Process (CDP) notice was more probable **not** to exist than to exist.

On 03 April 2003, the district court entered a decision and order finding that it lacked jurisdiction to consider the petitioner's claims for a motion of preliminary injunction. (App. at 3a) This ruling by the lower court throws the rules governing motions to dismiss under FRCP 12 into complete confusion.

The Fourth Circuit's approach of "ignoring a genuine material issue in dispute between the parties and not requiring the respondent to come forward with substantive evidence to sustain her burden of proving all affirmative defenses " before granting a motion to dismiss squarely conflicts with the evidentiary burden standards set by the other Circuits and in particular the standard set by this Court's decision in McDonnel Douglas Corp v Green, 411 US 792; Texas Dept. v. Burdine, 450 US 248 and Anderson v. Liberty Lobby, Inc., 477 US 242.

It is critically important for courts, the public and taxpayers to know whether the Fourth Circuit's decision is right or wrong. Among the important benefits of requiring the Commissioner with the burden of proving her good faith allegations in a affirmative defense is that it provides the taxpayer with an opportunity to a full and fair hearing without being prematurely denied his fundamental rights under the equal protection guarantee and due process clause of the Fifth Amendment. It also, has the potential to terminate the litigation if the Commissioner can not meet her burden of persuasion and burden of going forward with sufficient evidence to enable a trier of fact to support a decision for the IRS. If the Fourth Circuit is wrong, but the ruling remains unreviewed, the decision will unjustifiably deter taxpayers from challenging the Internal Revenue Service's wrongful collection practices which are not within the statutory scheme mandated by Congress. This Court should grant review to clarify the governing and judicial standards required for the IRS to seize a taxpayer's property without the IRS first providing the taxpayer with the Congressional mandated notices under 26 USC § 6303 and 26 USC § 6330 and to determine the evidentiary burden the Commissioner has when she files a motion to dismiss a taxpayer's complaint pursuant to FRCP 12(b)(1) and 12(b)(6). The Court should grant review to clarify whether or not the filing of a section 6320 CDP hearing request by a taxpayer enjoins the IRS from proceeding with their levy actions against the taxpayer when the matter is still pending before the courts.

Moreover, the issue arises here in a case of paramount importance. Allowing the Fourth Circuit's decision to stand unreviewed will place a "heavy burden of proof " on the taxpayer. The lower court's decision nullifies the principles and standards created under the FRCP 8, 10 and 12. And, if undisturbed, the decision below will be taken as an application for a different pleading standard for the taxpayer in determining the form and substance of pleadings, motions, and other papers permitted in the Federal District Courts for North Carolina, as well as nationally. Under the lower court's decision, FRCP 8, 10 and 12 have been turned on their heads. The lower court's decision has set a standard which requires a much heavier burden of proof on the taxpayer's statement of alleged facts. The taxpayer must now plead his claim with "beyond a reasonable doubt " standard rather than proving his claim with a "preponderance of the evidence" standard set by this Court for civil cases. This decision also, requires the taxpayer to come forward with more than just a simple, plain and concise statement that informs the Commissioner of the claim and that exhibits attached to the pleading are not a part of the pleading for all purposes. The decision sets a precedent that the lower courts do not have to follow this Court's decision in Anderson supra and Burdine supra and the lower courts can grant the Commissioner's motion to dismiss under FRCP 12(b)(1) and 12(b)(6), when the material jurisdictional facts are in dispute and the jurisdictional bases for the claim is intertwined with these disputed material facts. The lower court's decision is in direct conflict with this Court and the other circuit courts when a court tests the sufficiency of the plaintiff's claims on the pleadings alone.

Rules 12(b)(1) and 12(b)(6) requires the court to allow all parties a reasonable opportunity to present all material made pertinent to such a motion by either the basic tenets of American jurisprudence to procedural fairness or Rule 56. The courts, litigants, and the public will benefit by this Court granting review and determining the governing and judicial standards that taxpayers will be subject to when a taxpayer files a complaint in federal district court against the Internal Revenue Service for wrongful levy and / or lien actions.

REASONS FOR GRANTING THE PETITION

I. The lower court's decision is in direct conflict with this Court's decisions and the Federal Rules of Civil Procedure, Rules 8(a)(2) and 10(c)

Pro se litigants create unique problems for the Federal Courts. In recognition of this uniqueness the courts are obligated to construe the pro se pleadings and papers liberally. It is well settled law that the allegations of a pro se complaint, however in-artfully pleaded are held to less stringent standards than formal pleadings drafted by attorneys, Haines v Kerner 404 US 519, 520. A pro-se complaint is not to be dismissed unless it appears beyond all doubt that the petitioner can prove no set of facts in support of his claims which would entitle him to relief, Haines, supra @ 520- 521; Conley v

Gibson, 355 US 41, 45-46; Bolding v Holshouser 575 F.2 @ 464, (4th Cir.,1979).

In the great run of pro se cases, the issues are faintly articulated and often only dimly perceived. This Court has held, that the FRCP reject the approach that pleading is a game of skill in which one misstep by a party may be decisive to the outcome and accept the principle that the purpose of pleading, is to facilitate a proper decision on the merits, (Conley , supra). There is, therefore, a greater burden and a correlative greater responsibility upon the courts to insure that statutory deprivations are redressed and that justice is done. This does not mean that the court assumes the role of advocate for the pro se litigant, but it does create a duty upon the court to assist the pro se litigant and it directs the court to consider the case on its merits, Burris v State Department of Public Welfare of S.C. 491 F.2d 762 (4th Cir.1974); Gordon v Leeke, 574 F.2d @ 1151 (4th Cir., 1978); Canty v City of Richmond,Va., Police Depart. 383 F.Supp 1396 (E.D. Va. 1974), affirmed, 526 F.2d 587 (4th Cir.,1975), cert. denied, 429 US 1062 (1976).

FRCP, Rule 8(a)(2), the heart of an affirmative federal pleading need consist only of "a short and plain statement of the claim showing that the pleader is entitled to relief and to provide the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. The discovery process bears the burden of filling in the details. Also, FRCP Rule 10(c) permits incorporation of exhibits attached to a pleading and makes them an integral part of the pleadings for all purposes. This encourages short, concise pleadings, free of unwarranted repetition as well as to promote convenience in pleading. The petitioner incorporated in his allegations that he had not received the section 6303(a) and 6330 notices when he attached exhibit 4 to his complaint (App. at 90a-93a). The respondent acknowledged in her Memorandum Brief to the Fourth Circuit, (Docket No. 03-1569), Statement of Facts, seventh unnumbered paragraph (pg 5), that the petitioner had included in his complaint the allegations, "that taxpayer (petitioner) had not received the required notices under §§ 6303 and 6330, and asking the IRS to suspend collection until the § 6320 proceeding became final (A. 29-31)." This shows that the respondent had fair notice of the claim and a general indication of the type of litigation. The petitioner's complaint, therefore, met the requirements of FRCP, Rule 8(a)(2). Furthermore, if the allegations of a pleading are inconsistent with an exhibit, the exhibit is controlling, Olpin v. Ideal Nat. Ins. Co, 419 F.2d 1250 (10th Cir.,'69), cert. denied 397 US 1074).

The district court's order indicated (App at 7a, footnote 1), that the Court had made a thorough review of the record and the petitioner had failed to assert the claim/argument that he had not received the collection due process hearing notice for the levy action. And any arguments relating to the IRS's failure to provide a collection due process notice were not properly before the lower court. This was error. As discussed above the respondent acknowledged to the U.S. Court of Appeals for the Fourth Circuit that the respondent had fair notice by the petitioner's complaint of his claims that he had not received the section 6303 and 6330 notices.

The respondent contended on page 5 of her motion to dismiss that the petitioner in his complaint (section IV) admitted that he did not file a request for a CDP hearing regarding the section CDP 6330 hearing notice sent by the IRS on 29 December 2000. This was error on the part of the respondent. The petitioner's complaint contained by following:

> The plaintiff received a Federal Tax Levy (EXHIBIT 1) from his employer North Carolina State University (NCSU) on 17 May 2002, for alleged tax liabilities for tax years 1990, 1991, 1992 and 1993, from the IRS ACS Office in Kansas City, Mo. Because of a misunderstanding and timing of the IRS levy action, no action was taken on the levy.

The notice referred to above was dated on 17 May 2002, the reference to "no action was taken on the levy" plainly refers to the University taken no action on the levy notice sent the University and not the CDP notice allegedly sent to the petitioner on 29 December 2000.

In addition, the Commissioner referenced exhibits 1,2, 3, 5 and 6 from the petitioner's complaint in the respondent's motion to dismiss (31 Dec. 2002) and as discussed above the respondent has acknowledged that the petitioner's complaint (exhibit 4) gave the respondent fair notice that the petitioner had not received the section 6303(a) and 6330 notices. The respondent has not denied the fact that the petitioner did not receive the 26 USC § 6303(a) notice and the Commissioner's failure to deny this fact in the district court, the respondent has stipulated to its truth.

The lower court's action of granting the respondent's motion to dismiss the petitioner's complaint has denied the petitioner a full and fair opportunity to be heard on this matter. And the lower court has denied the petitioner his fundamental rights to due process and a guarantee to equal protection under the law.

II The lower court's decision is in direct conflict with this Court's and the other Circuits decisions and the Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6).

This Court has held that the party who sues the United States bears the burden of proving that the United States has waived its immunity. 28 USC § 1340 provides the district court with original jurisdiction of a civil action arising under an act of Congress providing for internal revenue. Section 1340 as a general jurisdictional statute, does not of itself constitute a waiver of the Anti-Injunction Act. An action brought under the exception 26 USC § 6330(e) to the Anti-Injunction Act 26 U.S.C. § 7421(a), lifts the barrier of immunity to enjoin the respondent from collecting alleged tax liabilities until a final determination on the merits of the Collection Due Process Hearing is decided (App at 81a & 86a). This exception was created by PL 106-554 to amend 26 U.S.C. § 7421(a) to compel the Commissioner to comply with the statutory scheme mandated by Congress pursuant 26 USC §§ 6320 and 6330(e). This exception to the Anti-Injunction Act provides the means for the petitioner to bring suit against the United States and the Commissioner of the IRS. This is made plain by both the text and the history of the exceptions to the Anti-Injunction Act. An exception to the Anti-Injunction Act mandates that the Commissioner shall enjoin all collection activity, if the taxpayer's complaint can set forth with the required specificity that he falls within one of these exceptions.

But what proof is required to meet this burden? This Court has determined at the early stage of the litigation, that the party suing the United States bears the burden of proving that the taxpayer falls within one of the Congressional mandated exceptions to the Anti-Injunction Act. As discussed above the petitioner has met his burden regarding this requirement.

This Court has determined the nature of the evidently burden placed upon the petitioner and the respondent. The basic allocation of burdens and order of presentation of the evidence is as follows (Texas Dept. of Comm. Affairs v. Burdine, 450 US 248). First the petitioner has the burden of proving by the preponderance of the evidence a prima facie case that the petitioner's complaint falls within an statutory or judicial exception to the Anti-Injunction Act. Second, if the petitioner succeeds in proving a prima facie case, the burden shifts to the respondent to rebut the presumption that the petitioner's complaint falls within an exception of the Anti-Injunction Act by producing evidence that the petitioner does not fall within one of these exceptions. Third, should the respondent carry her burden, the petitioner must be given an opportunity to prove by a preponderance of the evidence that the reasons offered by defendant are not true.

The petitioner in his original complaint stated that he had timely filed a request for a CDP hearing under 26 USC § 6320. This fact is undisputed by the parties. The filing of the CDP hearing request falls within the 6330(e) exception to the Anti-Injunction Act under 26 USC § 7421(a). The petitioner's complaint further alleged that he did not receive the Congressional mandated notices under 26 USC §§ 6303(a) and 6330.

Section 6320 language is plain and unambiguous under paragraph "c - Conduct of hearing; review; suspensions", For purposes of this section, subsection (c), (d), and (e) of section 6330 shall apply. Section 6330(e) language is also plain and unambiguous. [2]

Section 1340 provides the lower courts with jurisdiction over this matter and section 6330(e) as an exception to the Anti-Injunction Act, 26 U.S.C. § 7421(a), lifts the barrier of immunity to enjoin the IRS from collecting alleged tax liabilities. Since the disputed material facts surrounding whether or not the IRS properly mailed the petitioner the Congressionally mandated notices under sections 6303(a) and 6330 are to intertwined with the merits of this matter the lower courts should have left this jurisdictional determination of the controversy to trial. Therefore, the lower court should have denied the respondent's motion to dismiss under FRCP 12(b)(1) and 12(b)(6). And than the lower court should have turned its attention to the disputed material facts on whether or not the IRS sent the petitioner the Congressional mandated notices under 26 USC §§ 6303(a) and 6330.

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[2]

26 USC 6330(e):
Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), ...shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

Also, the petitioner falls within the judicial exception to the Anti-Injunction Act created by this Court in Enochs v. Williams Packing Co., 370 US 1 and this exception allows a taxpayer to enjoin the IRS when the Commissioner does not follow the statutory scheme mandated by Congress for the collection of alleged tax liabilities. Therefore, the lower courts should have dismissed the respondent's motion to dismiss and turned its attention to whether or not the petitioner falls within the injunction relief criteria set by Williams, supra.

This Court should grant review to clarify the governing, and judicial standards required before a lower court can dismiss a taxpayer's complaint under FRCP 12(b)(1) and 12(b)(6), because the lower court's decision in this matter nullifies the principles and standards created under FRCP 12 and the precedents set by this Court. And, if undisturbed, the decision below will be taken as an application for a different pleading standard for the taxpayer when disputes arise between the IRS and taxpayers regarding the statutory and judicial exceptions to the Anti-Injunction Act.

III The lower court's decision is in direct conflict with the statutory scheme mandated by Congress for the collection of alleged additional tax liabilities under 26 USC §§ 6303, 6320 & 6330 & this Court's and the other Circuit's decisions.

Congress has mandated, that prior to the IRS attempting to collect alleged additional tax liabilities, the IRS is to properly mail the taxpayer owing the alleged taxes the statutory notices under 26 USC § 6303(a) (Jersey Shore State Bank v U.S., 479 US 442) and § 6330. The failure of the IRS to send the § 6303 ((U.S. v McCallum, 970 F.2d 66 (5th Cir., '92); U.S. v Chilla, 871 F.2d 1015 (8th Cir., '89), cert. denied 493 US 975; Kulawy v U.S. 917 F.2d 729 (2nd Cir., '90)), and the § 6330 Congressional mandated notices, the Commissioner is barred from using her awesome administrative powers of levy and seizure against the taxpayer. Without the IRS's administrative levy powers the IRS's only means to seize a taxpayer's property for alleged tax liabilities is by judicial action for collection.

Sections 6320 and 6330 were mandated by Congress to ensure that the Commissioner has not mistakenly and/or erroneously assessed a tax liability that is not due the United States. And, if the taxpayer files a request for a section 6320 and/or 6330 hearing and it is the only request for a CDP hearing for the alleged tax liabilities in question, the IRS is to suspend all collection activities subject to these notices. The above Congressional mandated safeguards of a CDP hearing process is intended to be conducted in a open and fair manner prior to depriving a taxpayer of his property. These notices fulfill the intent of due process, which, if it is to serve its full purpose, is to provide an individual with a full and fair opportunity to be heard when the deprivation can still be prevented (Joint Anti-Fascist Refugee Committee v McGrath, 341 v US 123; Fuentes v Shevin, 407 US 67; Sniadach v Family Finance Corp., 395 U.S. 337).

It is undisputed by the parties involved in this dispute that the petitioner timely filed his CDP hearing request under 26 USC 6320. Congress incorporated section 6330(e) into section 6320 to provide the taxpayer with due process to ensure that the IRS does not erroneously deprive a taxpayer of his or her property. Section 6330(e) is a Congressional mandated exception to the Anti-Injunction Act , 26 USC 7421(a). The § 6330(e) exception lifts the barrier of immunity to enjoin the United States from collecting alleged tax liabilities, when the taxpayer has properly requested a CDP hearing under section 6320.

The petitioner made a prima facie case to the lower court that he fell within a Congressional mandated exception to the Anti-Injunction Act. And under this Court's decision in Burdine, supra, the evidentiary presentation burden required the respondent to come forward with evidence to rebut the petitioner's clear and concise evidence that the petitioner falls within an exception to the Anti-Injunction Act. The respondent's good faith allegation that she sent the petitioner the section 6330 CDP hearing notice is not evidence and as such the respondent did not meet her burden under Burdine. In addition to the petitioner prima facie case that he fell within an exception of section 7421(a), the petitioner showed the lower court by a preponderance of the evidence that under the IRS's manual and procedures it was more probable that the IRS did **not** send the petitioner the Congressional mandated 26 USC § 6330 CDP hearing notice than the IRS did send the notice. The IRS as a federal agency is required to follow their written policies and procedures (Administrative Procedure Act, 5 USC § 706).

Therefore, the lower court should **not** have dismissed the petitioner's complaint.

In the respondent's Memorandum Brief to the Fourth Circuit, Statement of Facts, fourth unnumbered paragraph (pg 4), the respondent alleged that the petitioner had admitted to receiving the section 6330 notice in his § 2410 litigation before the district court in 2001 (Follum v United States, 89 AFTR.2d 1625, (App at 12a, footnote 1) . But, as Dara B. Oliphant (trial attorney, Tax Division, U.S. Department of Justice), who represented the respondent in the 2001 litigation stated in her "Memorandum in Support of the Motion to Dismiss, Statement of Facts, third unnumbered paragraph. The "notice of intent to levy (§ 6330 notice or "Second Notice") was mailed to the petitioner on June 17, 1996, (Follum v Commissioner, 72 TCM 1076, (App at 61a, background, eleventh unnumbered paragraph)). The plaintiff admits to receiving this notice. (complaint pp. 10 - 11)". However, this notice does not comply with the amendments to § 6330, which Congress mandated under the "IRS Restructuring and Reform Act of 1998, PL 105 - 206. And since the IRS took no action to collect the alleged tax liabilities until 17 May 2002, which was after the effective date (19 January 1999) for the enactment of PL 105 - 206, the IRS was required to provide the petitioner with a § 6330 that complied with Congressional mandates of PL 105 - 206. Therefore, since the IRS has admitted that the § 6330 notice that the IRS sent the petitioner does not comply with PL 105 - 206, the IRS is barred from collecting the alleged tax liabilities until the IRS complies with the CDP hearing provision of the amended section 6330.

In addition to the petitioner's claim that the IRS did not send the petitioner the section 6330 CDP hearing notice the petitioner also claimed that the IRS did not send the petitioner the Congressional mandated notice under 26 USC § 6303(a). The petitioner's reply provided the lower court with clear and concise evidence that the respondent did not properly mail the section 6303(a) notice and demand for payment. The IRS knew weeks before sending the section 6303(a) notice to the Wilmington address that the Wilmington address was not a current address for the petitioner (Follum v Commissioner, 72 TCM 1076, (App at 57a); Follum v Commissioner 128 F.3d 118 (2nd Cir 1997), paragraphs 5 - 11, (App at 52(a)). Though the IRS knew the Wilmington address was not current the IRS sent the section 6303(a) notice to the Wilmington address. The respondent admitted to the Court of Appeals for the Second Circuit (Follum v. U.S., 199 F.3rd 1322) that she did not know where or if the section 6303(a) notices were actually sent to the petitioner. The respondent stated in open court the following: "To begin with we never conceded to the ...6303 notice was mailed to the Wilmington address, we don't know. ......There's no record on that. We don't know whether or not or where it was mailed."

When the IRS does not properly send a taxpayer the Congressional mandated section 6303(a) notice and demand for payment, the lower courts have decided that the IRS has no administrative means to collect the alleged tax liabilities and the only means for the IRS to collect the alleged tax liabilities is through judicial action for judgment (U.S. v Chila, supra; Marvel v U.S., 719 F.2d 1507, 1513-1514, (10th Cir., '83); U.S. v Berman 825 F.2d 1053, (6th Cir.,'87); U.S. v McCallum, 970 F.2d

66, (5th Cir., '92); Johnson v U.S., 990 F.2d 41, (2nd Cir., '93), cert. denied 116 S. Ct. 213, '95).

This Court should grant review to clarify the judicial standards required to enjoin the IRS from seizing a taxpayer's property when the taxpayer has timely filed a request for CDP hearing under 26 USC 6320 and the taxpayer has not had requested a CDP hearing under 26 USC 6330. Also, this Court has to clarify the judicial standards for a taxpayer to invoke this Court's judicial exception to the Anti-Injunction Act under Williams, supra, when the IRS does not provide the taxpayer with the Congressional mandated notices under 26 USC §§ 6303(a) and 6330. The lower court's decision to dismiss the petitioner's complaint nullifies the principles and the precedent set by the other Court of Appeals. And, if undisturbed, the decision below will be taken as an application for a different standard for the taxpayer when the taxpayer petitions the lower courts for an injunction under one of the exceptions to the Anti-Injunction Act or the judicial exceptions to the Anti-Injunction Act, under Williams, supra.

IV The lower court's decision is in direct conflict with the Fourth and Fifth Amendments and this Court's decisions.

The preamble of the Constitution, proclaiming the establishment of the Constitution, in order to secure the blessing of liberty, uses the word "secure" in the sense of "protect" or "make certain" that the fundamental rights and liberty guarantees under the Fourth and Fifth Amendment guard against arbitrary misuse of the statutes by government officials. The Commissioner's wrongful levy actions against the petitioner violates the petitioner's due process and equal protection rights under the Fifth Amendment and his right against unreasonable searches and seizures under the Fourth Amendment.

For purposes of an administrative search and seizure, probable cause is based on the showing that legislative and administrative standards for seizure of property have been satisfied. Congress has mandated that the IRS has to properly mail the taxpayer a 26 USC § 6303(a) notice of assessment and demand for payment and a 26 USC § 6330 collection due process hearing notice prior to collecting any alleged additional tax liabilities. Congress has also mandated that when the IRS sends a taxpayer a 26 USC § 6320 collection due process hearing notice and the taxpayer timely files the CDP hearing request with the IRS and this is the taxpayer's only CDP hearing request that the taxpayer has filed for the alleged tax liabilities the IRS is to suspend any levy action subject to the CDP hearing request. In the instant case the Commissioner has **not** followed this statutory scheme mandated by Congress.

The IRS code and regulation amendments are outgrowths of Senate committee investigations that revealed that IRS employees have extensively used unauthorized agency practices and have violated taxpayer's Constitutional / Statutory rights in assessing additional tax liabilities against the taxpayer. To guarantee that the IRS protect the taxpayer's rights, Congress enacted sections 6320 and 6330, under IRS Restructuring and Reform Act of 1998 (PL 105-206). Congress enacted the above statutes to further strengthen previous amendments to the Internal Revenue Code (IRC) under Tax Reform Act of 1986

(PL 99-514); the Taxpayer Bill of Rights 1 and 2, IRC § 7520(b)(1)(A) and IRC § 7811 and the Taxpayer Relief Act of 1997 (PL 105-34). These statutes were enacted to ensure that the IRS protect the taxpayer's individual interests and to provide the taxpayer with a means to invoke the Due Process Clause.

The Due Process Clause is first and foremost a guarantor of process. It embodies a commitment to procedural regularity and fair application of procedures independent of the eventual result. When, as here, the government engages to protect individual interests, it can not constitutionally abrogate that commitment at its own convenience. No plausible claim of executive urgency, including the Government's reliance on levy actions, justifies the summary seizure of property unless the Government maintains strict control over its monopoly of legitimate force.

The Sniadach Court determined that wages are a specialized type of property presenting distinct problems in our present day economic system. A taken of a individual wages imposes a tremendous hardship on the wage earner. And the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference (Fuentes, supra). Congress created the Collection Due Process Hearing statutes to fulfill these Constitutional requirements and to stop the historical abusive practices of the IRS in their pursuit to collect alleged tax liabilities. The Fuentes Court found policy reasons why a hearing must precede the arbitrary deprivation of a person's property.[3] Congress intended the hearing requirements under 26 USC §§ 6320 and 6330 to fulfill the above Constitutional mandates and to eliminate the historical abuses by the IRS when collecting alleged additional tax liabilities.

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[3]

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a meaningful time and in a meaningful manner when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not embraced the general proposition that a wrong may be done if it can be undone" (Stanley v Illinois, 405 US 645, 647).

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case" (Mullane v Central Hanover Tr. Co., 339 US 306, 313), and "depending upon the importance of the interests involved and the nature of the subsequent proceedings," (Boddie v Connecticut, 401 US 371, 378), the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. Bell v Burson, 402 US 535, 542; Wisconsin v Constantineau, 400 US 433, 437; Goldberg v Kelly, 397 US 254; Armstrong v Manzo, 380 US at 551; Mullane v Central Hanover Tr. Co., supra at 313; Opp Cotton Mills v Administrator, 312 US 126, 152-153; United States v Illinois Central RR. Co. 291 US 457, 463; Londoner v City & County of Denver, 210 US 373, 385-386. See In re Ruffalo, 390 US 544, 550-551). "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root .... requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, ..." (Boddie v Connecticut, supra, at 378-379, (emphasis in original)).

In order to place a lien against a taxpayer's property, the IRS must make a valid assessment of taxes pursuant to 26 USC § 6203. After a determination is made, the IRS must send a § 6212 " Notice of Deficiency" to the taxpayer. Than the IRS must provide a "Notice and Demand for Payment" of the assessed tax as required by § 6303(a). Only after compliance with these procedures, may the IRS make a lien and/or levy on the delinquent taxpayer's property (Kulawy v US, 917 F.2d 729; Aqua Bar & Lounge, Inc. v US 539 F.2d 935; Guthrie v US, 970 F.2d 733, 10th Cir., 1992; Johnson v US, 990 F 2.d 41, 2nd Cir., 1993, cert. denied 116 S. Ct 213,1995; Goodwin v US, 935 F.2d 1061, 9th Cir., 1991).

Once the IRS has complied with above and properly mails the taxpayer a section 6303(a) notice the IRS can proceed to the next Congressional mandated procedure to collect the alleged tax owed the United States. However, prior to collecting the alleged tax owed, Congress has mandated that the IRS must send the taxpayer the statutory notices under sections 6320 and / or 6330. Only after the IRS has maintained strict control and complied with the above Congressional mandated statutory scheme for collecting the alleged taxes owed, may the IRS use its administrative powers to seize the taxpayer's property.

In the instant case the IRS did not comply with the above statutory scheme mandated by Congress prior to seizing the petitioner's property. Failure of the IRS to maintain strict control over her monopoly of legitimate force, bars the IRS from collecting the alleged tax liabilities with any other means but judicial intervention to reduce the alleged tax liabilities to judgment. As discussed above the IRS did not provide the petitioner with the section 6303(a) notice nor did the IRS provide the petitioner with the section 6330 CDP hearing notice. The record shows by clear and convincing evidence that the respondent did not provide the petitioner with the Congressional mandated notice under section 6303(a). And the record is bare of any competent proof by the respondent that she provided the petitioner with the Congressional mandated notice under section 6330.

The respondent provided no evidence to substantiate her good faith allegation that she properly mailed the petitioner the section 6330 notice. The respondent made the same good faith allegation in previous litigation for the same alleged tax liabilities that she properly mailed the petitioner the section 6303(a) notice and demand for payment. The petitioner showed the lower court in the instant case by clear and convincing evidence that the respondent did not properly mail the petitioner the Congressional mandated notice under section 6303(a). The petitioner also, showed the lower court in the instant case by a preponderance of the evidence that under the IRS's procedures it was more probable that the IRS did **not** send the petitioner the 6330 CDP hearing notice as mandated by Congress. Under similar facts and circumstances, the courts have determined that when the IRS has in her possession evidence to prove her allegations the IRS is to come forward with that evidence rather than relying on her good faith allegation. If the IRS mailed the petitioner the 6330 CDP hearing notice she should have in her possession the Congressional mandated United States Postal Service mailing return receipt. Also, since the petitioner has shown with credible evidence that the section 6303(a) and 6330 notices were not sent to the petitioner, Congress has mandated under 26 USC 7491 that the IRS has the burden of proof to come forward with evidence to substantiate her allegations.

The respondent admitted on page 4, third paragraph of her Memorandum Brief to the Fourth Circuit that the petitioner timely filed a request for a CDP hearing under section 6320. The filing of the request for the section 6320 notice should have suspended the IRS's seizure of the petitioner's property, because section 6320(c), incorporates the provisions under section 6330(c)(d) & (e) into 26 USC § 6320 (Lindsay v Commissioner 82 TCM 816, (2001). Since the provisions of sections 6320 and 6330 are to be read together, it is obvious that section 6320 is intended to enjoin the IRS from collecting the alleged tax, especially when both the text and the history of the Senate Committee report (Senate Report pg. 67) which drafted these statutes made it clear that "taxpayers are entitled to due process, that requires the IRS to provide the taxpayers with notice and a meaningful hearing prior to the IRS depriving the taxpayers of their property. And this minimal required due process will increase fairness to the taxpayer."

The last issue and it probably should have been listed as one of the first, is the assertion by the district court for the ENDC, that the petitioner brought his original complaint under a claim that the Government's sovereign immunity was lifted in the instant case by 26 USC 6330(d)(1), (App at 5a, Analysis, 1. Sovereign Immunity). This was error. The petitioner claimed in his original complaint as he has through-out this litigation that the Government's sovereign immunity is lifted by 26 USC 6330(e), which is incorporated into and forms a part of 26 USC 6320. And since § 6330(e) is an exception to § 7421(a) the Government has waived its sovereign immunity and the Anti-Injunction Act is not a bar to the petitioner present litigation.

The respondent's conduct in the instant case has violated the petitioner's rights and privileges as guaranteed by the Constitution and laws of the United States. The failure of the IRS to seek judicial intervention to reduce the alleged tax liabilities to judgment and to suspend the seizure of the petitioner's property has violated the petitioner's Fourth and Fifth Amendment rights. Therefore, the respondent's seizure of the petitioner's property has caused the petitioner irreparable harm.

In accepting review of the first two Questions Presented, it would be appropriate for the Court to address the last question on whether the IRS's collections actions violated the petitioner's Constitutional rights under the Fourth and Fifth Amendments.

CONCLUSION

For the foregoing reasons, Warren R. Follum respectfully requests the Court grant his petition for certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 03-1569
WARREN R. FOLLUM,Plaintiff - Appellant,
v. UNITED STATES OF AMERICA;
COMMISSIONER OF INTERNAL REVENUE,
Defendants - Appellees.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
CA-02-818-5-B0(3)
Submitted: September 30, 2003
Decided: October 7, 2003

Before: Wilkinson, Niemeyer, and Michael, Circuit Judges.
Affirmed by unpublished per curiam opinion.

Counsel: Warren R. Follum, Appellant pro se,.
Bruce Raleigh Ellisen, Sara Ann Ketchum, United States Department of Justice, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c) .

PER CURIAM:

Warren R . Follum appeals from the district court's order denying his motion for a preliminary injunction and dismissing his complaint in which he sought to enjoin the Internal Revenue Service from proceeding on a tax levy pending completion of his administrative appeal from the imposition of a tax lien. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Follum v. States, No. CA-02-818-5-B0(3) (E.D.N.C. Apr. 3 , 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

WARREN R. FOLLUM, Plaintiff, v. UNITED STATES OF AMERICA, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, Defendants.
NO. 5:02-CV-818-B0(3)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION
91 A.F,T.R.2d 1938
March 28, 2003, Decided
April 3, 2003, Filed

DISPOSITION: Application for preliminary injunction denied, and motion to dismiss granted. Plaintiffs case dismissed in its entirety.

COUNSELS: Warren R Follum, Plaintiff, Pro se, Raleigh, NC. **For United States of America,** Respondent: R A Renfer, Jr, Asst US Attorney, Office of US Attorney, Raleigh, NC. Dara Oliphant, US Department of Justice, Washington, DC. **For Commissioner** of the Internal Revenue Service, Respondent: R A Renfer, Jr, Asst US Attorney, Office of US Attorney, Raleigh, NC.

JUDGE: Honorable Terrence W. Boyle, Chief United States District Judge

OPINION BY: Honorable Terrence W. Boyle

OPINION: ORDER

This matter is before the Court on Plaintiffs Application for Preliminary Injunction and Defendants' Motion to Dismiss. For the following reasons, Plaintiffs Application for a Preliminary Injunction will be DENIED, and Defendants' Motion to Dismiss will be GRANTED.

BACKGROUND:
Plaintiff Warren R. Follum filed the instant lawsuit on November 4, 2002, seeking a temporary restraining order and preliminary injunction to prevent the Internal Revenue Service ("IRS") from levying on wages he receives from North Carolina State University. The levy arises out of Plaintiffs tax deficiency for the years 1990, 1991, 1992, and 1993. Plaintiff has unsuccessfully challenged this deficiency and the government's collection efforts in three prior proceedings. See Follum v. Comm'r, 72 T.C.M. 1076 (1996), affd, 128 F.3d 118 (2d. Cir. 1997); Follum v. United States, U.S. Dist. 98-1 U.S.T.C. ¶50,410 (W.D.N.Y.,1998); Follum v. United States, 89 A.F.T.R.2d 1625 (E.D.N.C. 2001).

According to Defendants, on December 29, 2000, the IRS provided Plaintiff with a due process notice, pursuant to 26 U.S.C. § 6330, that it intended to levy on his wages. Defendants contend that Plaintiff did not contest this wage levy, as permitted under 26 U.S.C. § 6330, and the levy was therefore served on Plaintiffs employer, North Carolina State University. North Carolina State University did not respond to this levy, and a second levy was issued on August 21, 2002. On October 7, 2002, the IRS received a payment of $ 2,914.30 and has since reduced the amount of the levy to $ 2,000.00 per pay period.

On August 12, 2002, the IRS provided Plaintiff with due process notice, pursuant to 26 U.S.C. § 6320, that it intended to file a notice of federal tax lien. Plaintiff filed a timely notice of appeal of this federal tax lien, and this appeal is currently pending. Plaintiffs Complaint seeks to enjoin the IRS from levying on his wages until a final decision is rendered in this appeal. A hearing was held in this matter on January 24, 2003 in Raleigh, North Carolina.

ANALYSIS

A. Defendants' Motion to Dismiss

1. Sovereign Immunity

Defendants claim that the United States has not waived sovereign immunity with respect to Plaintiffs claim, and therefore, this action must be dismissed for lack of subject matter jurisdiction. The United States can be sued only when it has expressly consented to suit. See, *e.g.*, United States v. Dalm, 494 US, 596, 608, (1990); United States v. Mitchell, 445 U.S. 535, 538,(1980). I n this case, Plaintiff claims that sovereign immunity has been waived pursuant to 26 U.S,C. § 6330(d)(1), which provides for judicial review of the IRS's administrative determination to proceed with a levy following a taxpayer's collection due process appeal. Defendants argue, however, that Plaintiff did not file a timely collection due process appeal with respect to the levy at issue in this action and, therefore, has not satisfied the prerequisites for filing suit under 26 U.S.C. § 6330(d)(1).

Plaintiff claims that, because he filed a collection due process appeal regarding the federal tax lien, the IRS should have suspended the levy on Plaintiffs wages. However, because the federal tax lien and wage levy are separate and distinct collection tools, Plaintiffs timely appeal of the lien did not constitute an appeal as to the levy. See 26 C.F.R. 5 301.6320-1(9)(2) Q&A-G3 (explaining that "levy actions . . . are not the subject of (explaining that "levy actions . . . are not the subject of a [collection due process] hearing under section 6320. The IRS may levy for tax periods and taxes covered by the [collection due process] notice under section 6320 . . . if the [collection due process] requirements under section 6330 for those taxes and periods have been satisfied.").

Because Plaintiff did not request a collection due process hearing with respect to the wage levy, he can not file suit pursuant to 26 U.S.C. § 6330(d)(1). Therefore, the United States has not waived sovereign immunity with respect to Plaintiffs claim, and this Court lacks subject matter jurisdiction.

2. Anti-Injunction Act

I n a second and related argument, Defendants claim that this Court lacks subject matter jurisdiction because Plaintiffs claim is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). This statute provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I n his request for relief, Plaintiff clearly seeks injunctive relief restraining the collection of a tax. Plaintiffs claim is therefore barred unless it fits within an exception to § 7421(a). Plaintiff contends that, because he is alleging that the Commissioner violated 26 U.S.C. § 6330(e) by failing to suspend the levy on Plaintiffs wages pending the outcome of the collection due process hearing, his claim falls within one of the statutory exceptions set forth in § 7421(a). However, for the reasons discussed above, Plaintiff cannot maintain an action related to the levy under § 6330 because he failed to request a collection due process hearing with respect to this levy.

Moreover, because Plaintiff is free to pursue the pending due process appeal of the tax lien or pay the tax and sue for a refund pursuant to 26 U.S.C. § 7422, this claim does not fall within the judicially created exceptions § 7421(a). See South Carolina v. Regan, 465 U.S. 367, 373,(1984) (holding that the Anti-Injunction Act does not bar an action to enjoin the collection or assessment of a tax where Congress has provided no alternative means of challenging the validity of the tax); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, Anti-Injunction Act does not apply if (1) the government could not prevail under any circumstances and (2) equity jurisdiction otherwise exists).

The Court therefore concludes that the relief sought by Plaintiff is barred by the Anti-Injunction Act. As a result, this Court lacks subject matter jurisdiction and must dismiss Plaintiffs Complaint[1].

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[1] At the January 24, 2003 hearing and in his "Cross-Motion to Deny Respondent's Motion to Dismiss and Preliminary Injunction," Plaintiff claims that he did not receive a collection due process notice regarding the wage levy. A thorough review of the record in this case reveals that Plaintiff failed to assert this argument in his Complaint. Instead, Plaintiff stated that "because of a misunderstanding and the timing of the IRS levy action, no action was taken on the levy,". Accordingly, any arguments relating to the IRS's failure to provide a collection due process notice are not properly before the Court and will not be considered at this time.

B. Plaintiffs Application for Preliminary Injunction

As discussed above, Plaintiffs Complaint must be dismissed due to lack of subject matter jurisdiction. Plaintiffs Application for Preliminary Injunction is therefore denied.

CONCLUSION: For the reasons stated above, Plaintiffs Application for Preliminary Injunction is DENIED and Defendants' Motion to Dismiss is GRANTED. Plaintiffs case is hereby DISMISSED in its entirety.

SO ORDERED: This 28 day of March, 2003.
Terrence W. Boyle, Chief United States District Judge

JUDGMENT: Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.
April 3, 2003

WARREN RICHARD FOLLUM, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.

NO. 5 :01-CV-407-F(2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION

89 A.F.T.R.2d 1625

Decided and Filed: November 30, 2001

1. Actions against U.S. - quiet title—res judicata. Pro se taxpayer's 2d 28 USC § 2410 action for relief from tax liens and levies was dismissed: res judicata barred the suit that involved same parties, same improper challenge to underlying taxes and same requested relief from those taxes that were subject of prior, final § 2410 decision; and, to extent taxpayer asserted new IRC § 6303 grounds for relief, such previously available and should have been asserted in prior suit. Reference: United State Tax Reporter ¶74,337.503(40); 74,336.507(40). IRC § 6303

PRIOR HISTORY: Follum v. United States, 199 F.3d 1322, (2d Cir. N.Y., 1999)
DISPOSITION: Government's Motion to Dismiss allowed.
COUNSEL: Warren Richard Follum, Plaintiff, Pro se, Raleigh, NC. **For United States of America,** Respondent: John S. Bruce and Dara Oliphant, US Department of Justice, Washington, DC.
JUDGES: Honorable James C. Fox, Senior United States District Judge,
OPINION BY: Honorable James C. Fox

OPINION: ORDER

Pro Se Plaintiff Warren Richard Follum initiated the instant action seeking relief from tax levies/liens imposed on his property. The tax levies/liens arise out of the plaintiffs tax deficiency for 1990, 1991, 1992, and 1993; such deficiency was the subject of actions filed in Follum v. Commissioner, 72 T.C.M (CCH) 1076 (October 22, 1996), affd 128 F.3d 118 (2nd Cir. 1997), and Follum v, United States of America, 81 AFTR.2d 98-1927 (W.D.N.Y. 1998).

Follum now asserts that he is entitled to relief, under 28 U.S.C. § 2410, from the tax liens/levies because the Government never provided him with Notice of Assessment and Demand for Payment, as required by 26 U.S.C. § 6303. The Government has moved to dismiss the current action, contending that it is barred by res judicata. The parties have fully briefed the motion to dismiss and it is now ripe for disposition.

Prior Litigation

Follum was assessed income tax liability for the 1990, 1991, 1992, and 1993 tax years, pursuant to defaulted statutory notices of deficiency. On April 29, 1996, the plaintiff filed a petition to the United States Tax Court (the "1996 Action"), requesting the tax court to redetermine his tax liability and to restrain the Internal Revenue Service ("IRS") from administratively collecting his taxes through tax liens or levies. As a basis for his petition, Follum argued that the IRS's notice of deficiency was defective in that it was not mailed to Follum's "last known address," as required by 26 U.S.C. § 6212. Rejecting Follum's argument, the tax court held that the IRS did satisfy the statutory notice requirements, and concluded: "Because petitioner failed to file a timely petition for redetermination, it follows that we lack authority to restrain respondent from collecting taxes for the years in question." Follum, 1996 WL 601854 at 3. In a per curiarn opinion, the Second Circuit affirmed the Tax Court's decision. See 128 F.3d 118 (2nd Cir. 1997).

Subsequently, in 1998, Follum initiated a quiet title action (the "1998 Action"), under 28 U S C . § 2410, in the District Court for the Western District of New York. I n that action, Follum contended that the IRS had improperly assessed his tax liability for 1990, 1991,1992, and 1993. Specifically, he argued that the 1990 and 1991 tax assessments were barred by the three-year statute of limitation provided in 26 U.S.C. § 6501(a), and further claimed that the disputed assessments were null and void because notice was not properly provided, in violation of § 7605(b). Rejecting Follum's request to enjoin the Government from "proceeding with tax levy/liens against [him] for the tax years 1990, 1991, 1992, and 1993," the district court held that § 2410 did not allow a tax payer to collaterally attack the substantive validity of the underlying tax assessment that led to the lien or levy. See Follum, 98-1 USTC ¶ 50,210("[W]hat plaintiff is seeking in this case is a declaration by this Court that he does not have to pay the taxes that the IRS says he owes. Such a challenge is clearly substantive .,. and therefore cannot be brought under § 2410."). Thus, the district court refused to enjoin the Government from administratively collect the plaintiffs tax liability.

The Instant Action

Follum once again comes before the courts seeking § 2410 relief from his 1990, 1991, 1992, and 1993 tax liability. In the instant action, Follum asks the court to remove the Government's tax liens/levy from his property because the IRS failed to provide proper Notice and Demand, as required by 26 U.S.C. § 6303(a). Specifically, the plaintiff contends that he did not receive § 6303 notice ("First Notice"), and that the IRS did not send the notice to his last known address.[1] Accordingly, Follum "requests relief in denying the Commissioner her awesome power of lien and levy without judicial intervention." Plaintiffs Response to Motion to Dismiss, at 3.

Motion to Dismiss

In its motion to dismiss, the Government argues that plaintiff's action is barred by res judicata. The court agrees.

The doctrine of res judicata, also called claim preclusion, provides that "a final judgment on the merits bars further claims by the parties or their privies on the same cause of action," Montana v. United States, 440 U.S. 147, 153 (1979), and this bar applies to "all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 US. 127, 131 (1979). In the instant action, the court finds that the plaintiff seeks to assert a new basis of relief from tax liability that was "previously available" to him in his prior lawsuits. Accordingly, the court finds that the doctrine of res judicata is applicable.

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[1] Follum admits that he received § 6330 Notice of Intent to levy (second Notice). Thus Follum is not challenging procedural irregularities in the seizure or sale of property.

The § 6330 referred to above was mailed to the petitioner on 17 June 1996 and does not comply with the notices requirements enacted under the IRS Restructuring and reform act of 1998, (PL 105-206). And since the IRS took no action to collect the alleged tax liabilities until 17 May 2002, they were required to send the petitioner a collection due process hearing notice under § 6330 that was amended by PL 105-206.

There are three requirements that must be satisfied before the doctrine of res judicata is applicable: (1) the parties to subsequent litigation must be the same as, or in privity to, those in the prior litigation; (2) the claims in the subsequent litigation must be the same in substance as those in the prior litigation; and (3) the prior litigation must have resulted in a final judgment on the merits. See Nevada v. United States, 463 U.S. 110, 129-130 (1983).

There can be no doubt that the first requirement is met in the instant action. Follum was the plaintiff in both prior actions and the Government was the defendant.

With respect to the substance of the instant action, the court finds that the plaintiff is seeking exactly the same relief that he attempted to obtain in the 1998 Action: § 2410 relief from the Government's adminstrative tax collection procedures. In the 1998 Action, Follum sought to enjoin the imposition of tax liens /levies on his property by contending that IRS's tax assessment was null and void. In the instant action, Follum reasserts that notice was deficient and requests the court to remove the tax liens/levies from his property. Any way it is sliced, the plaintiff has sought the same relief in each action: "a declaration by the Court that he does not have to pay the taxes that the IRS says he owes." Follum, 98-1 U.S.T.C. ¶ 50,410. Even assuming that the plaintiffs § 6303 defense is different from his prior defenses, Follum had the opportunity to assert such defense in the previous actions and, for whatever reason, he did not.

Finally, the court finds that the subject of the prior litigation resulted in a final judgment on the merits. I n the 1998 Action, the district court concluded that Follum was entitled to no relief under § 2410, because § 2410 permits only challenges to procedural irregularities in the seizure and sale of property, not challenges to the underlying tax assessment. Here, Follum again attacks the underlying assessment. Regardless of which basis Follum asserts to attack the underlying tax assessment--i.e., violation of §§ 6212, 7605(b), or § 6303--it is obvious that such a collateral attack is not permitted under § 2410, a finding upon which the district court based its decision in the 1998 Action. Thus, the plaintiffs present action is barred by res judicata.

Accordingly, the Government's Motion to Dismiss is ALLOWED. The Clerk of Court is DIRECTED to close this case and remove the matter from the court's docket.

SO ORDERED.
JAMES C. FOX -Senior United States District Judge

Appendix D - 15a

WARREN RICHARD FOLLUM, Petitioner-Appellant,
v. UNITED STATES OF AMERICA,
Respondent-Appellee.
NO. 99-4049
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
199 F.3d 1322
Decided: 15 October 1999

1. Actions to restrain assessment - sovereign immunity; Anti-Injunction Act; wrongful levy; quiet title - substantive merit. District court properly granted govt. summary judgment in taxpayer's action to quiet title to 2 vehicles and his wages and to invalidate underlying assessment: gov't didn't waive sovereign immunity under 28 USC § 2410 where taxpayer's claim wasn't merely procedural and he was subject to "pay first and litigate later" requirement; and AIA barred taxpayer's claim for injunctive relief and no exception applied. Referenace: United States Tax Reporter ¶74,225.01(20); 74,215.05(5); 74,336.507(40). IRC § § 7421; 7422; 7426.

NOTICE: Decision without Published Opinion. Unpublished opinions are not binding precedent in this circuit.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of New York (Richard J. Arcara, Judge).

COUNSEL: Warren R. Follum, Lewiston, N.Y., Appellant pro se,. Sara Ann Ketchum, Loretta C. Argrett and Ann B. Durney, United States Department of Justice, Washington, D.C., and Denise E. O'Donnell, United States Attorney for the Western District of New York , on the brief for Appellees.

BEFORE: Jacobs, Calabresi, and Straub, Circuit Judges

OPINION: Summary Order

Upon due consideration, it is hereby ordered, adjudged and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Warren Richard Follum, proceeding pro se, appeals from an order of the United States District Court for the Western District of New York (Arcara, J.), dismissing his quiet title suit against the United States for lack of jurisdiction. We affirm

Follum brought this action against the United States under 28 USC § 2410(1994), seeking to quiet title to two vehicles and his wages, the subject of federal tax liens, and claiming that the underlying federal tax assessments were invalid for various reasons.

The United States is immune from suit except where it has expressly waived that immunity and consented to be sued. See Federal Deposit Ins. Corp. v Meyer, 510 US 471, 475 (1994). Section 2410 creates a limited exception to the United States' sovereign immunity by allowing the United states to be named as a party in suits, inter alia, "to quiet title to.....real or personal property on which the United States has or claims a mortgage or other lien, "28 USC § 2410(a), and it is within this exception that Follum seeks to fit his claim.

Section 2410 has universally been construed not to extend to a suit brought by a taxpayer for the sole purpose of challenging the validity or amount of an underlying tax assessment. See e.g. Johnson v United

States, 990 F.2d 41, 42 (2nd Cir., 1993). This Circuit has held, however that a suit may properly be brought under § 2410 when a party "challenges(s) procedural irregularities in the assessment process" Id. Thus, in Johnson, we allowed the plaintiff to maintain an action to quiet title, in which he claimed that a tax lien on his property was invalid because the IRS improperly assessed a tax deficiency before the Tax Court's decision became final. See Id. The court commented, "Johnson's claim is procedural because he disputes the timing of the assessment, not its amount". Id at 43.

[1] Follum argues that, as in Johnson, his claim is procedural and therefore comes within the waiver of sovereign immunity in § 2410. But because Follum seeks to invalidate the underlying tax assessments completely, and permanently to free himself of liability for the taxes owed, rather than to dispute issues like the mere timing of the assessment, his claim must be characterized as substantive. Accordingly, as the district court found, Follum cannot evade the requirement that he "pay first and litigate later" Falik v United States 343 F.2d 38, 42 (2nd Cir., 1965)(Friendly, J.) (internal quotations marks omitted), by invoking § 2410.

Moreover, to the extent that Follum seeks an injunction against the United States preventing it from assessing or collecting taxes, his suit is barred by 26 USC § 7421(a)(1994), which provides that "no suit for the purposes of retraining the assessment or collection of any tax shall be maintained in any court by any person" Id. A narrow judicial exception to § 7421 allows such suit when (1) the disputed assessment is unquestionably incorrect, (2) the plaintiff will suffer irreparable injury if forced to pay, and (3) the plaintiff is without an adequate remedy at law. See Encochs v Williams Packing & Navigation Co., 370 US 1, 5-7 (1962). Follum meets none of the requirements for this exception. In particular, he has not shown that a suit for a refund, after payment of the assessed taxes, would be an inadequate remedy.

We have considered all of Follum's claims and find them to be without merit. The district court's judgment is, therefore, AFFIRMED.

WARREN RICHARD FOLLUM, Plaintiff, v. UNITED STATES OF AMERICA, COMMISSIONER OF THE IRS, Defendant.

98-cv-0126A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

83 A.F.T.R.2d 1622

Decided, March 3, 1999. Filed, March 9, 1999

1. Actions to restrain assessment - sovereign immunity; Anti-Injunction Act; wrongful levy; quiet title - substantive merit. Gov't was granted summary judgment in pro se taxpayer's action challenging tax assessments: Gov't didn't waive sovereign immunity where taxpayer didn't pay assessments or file refund claim. AIA barred taxpayer's claim for injunctive relief and no exception applied. Wrongful levy claim was barred where taxpayer was person against whom tax that gave rise to levy, was assessed; and quite title claim seeking permanent injunction was barred where assessments and assessments were based on improper 2d record investigation were impermissibly substantive. And, even if action could be maintained, taxpayer's untimely assessment claims lacked substantive merit where he properly signed Form 5213 to postpone profit determination of sport fishing activities, thereby extending assessments' limitation periods and consenting to continued inspection of activity's books. Reference: United States Tax Reporter ¶74,225.01(20); 74,215.05(5); 74,265.01(15), 74,336.507(40). IRC § § 7421; 7422; 7426.

DISPOSITION: Judgment entered in favor of defendant.
COUNSEL: Warren Richard Follum, Pro se, Lewiston, NY. **For United States of America:** Jane B. Wolfe, Esq., United States Attorney, Buffalo, NY; William M. Kostak, Esq., Department of Justice, Washington, DC.
JUDGES: Honorable Richard J. Arcara, United States District Court
OPINION BY: Honorable Richard J. Arcara
OPINION: DECISION AND ORDER

INTRODUCTION:
Plaintiff Warren Richard Follum commenced this action pro se on February 24, 1998, against the United States, seeking relief under 28 U.S.C. § 2410. Plaintiff claims that the United States Internal Revenue Service (IRS) has improperly assessed that he owes taxes for the tax years 1990, 1991, 1992, and 1993. More specifically, plaintiff claims that the tax assessments regarding 1990 and 1991 are barred by the three-year statute of limitations in 26 U.S.C. § 6501(a) and that any levy or lien claimed by the United States under 26 U.S.C. 6502 regarding those assessments is therefore invalid. He further claims that all the disputed assessments should be barred because the IRS improperly conducted a second investigation of his records, without notice, in violation of 26 U.S.C. § 7605(b). Plaintiff asks that the Court enjoin the IRS from placing a lien on plaintiffs property for the purpose of collecting the disputed tax assessments.

On March 10, 1998, plaintiff filed a motion for a preliminary injunction, seeking an order from the Court enjoining the IRS from "proceeding with tax levy/liens against the plaintiff for the tax years 1990, 1991, 1992 and 1993 until a final disposition" of this case on the merits. I n a Decision and Order Filed April 29, 1998, the Court denied plaintiffs motion for a preliminary injunction.

On May 11, 1998, the United States moved to dismiss the action, pursuant to Fed. R. Civ. P. 12(b)(l) and 12(b)(6), or in the alternative, for summary judgment, pursuant to Fed. R. Civ. P. 56. On that same day, May 11, 1998, plaintiff moved to amend his complaint. By Order filed May 18, 1998, the Court granted plaintiffs motion to amend his complaint and denied, without prejudice, the United States' motion to dismiss and for summary judgment.

On May 19, 1998, the Clerk of Court filed plaintiffs amended complaint. The amended complaint is similar to the first complaint, except: (1) instead of naming the United States as a defendant, the amended complaint identifies the defendant as "United States of America, Commissioner of the IRS;" and (2) while plaintiffs original complaint did not specify any real or personal property to which his quiet title action related, the amended complaint specifies such personal property (two motor vehicles and his wages from his employer).

On June 15, 1998, the United States moved to dismiss the amended complaint, pursuant to Fed. R. Civ. P. 12(b)(l) and 12(b)(6), or in the alternative, for summary judgment, pursuant to Fed. R. Civ. P. 56. Plaintiff filed a response to the motion on July 15, 1998. The United States filed a reply on March 1, 1999.

Because in their motion papers both parties have referred to and included evidence outside the pleadings, the Court will consider the United States' motion as one for summary judgment rather than a motion to dismiss. After carefully reviewing the papers, the Court grants the United States summary judgment.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). In other words, the moving party in entitled to summary judgment where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, (1986). Once a motion for summary judgment has been made and supported, the nonmoving party may not rest on mere allegations, but must set forth proof of specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). In deciding a motion for summary judgment, the Court must resolve all ambiguities and draw all inferences in favor of the nonmoving party. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985). At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In other words, on a motion for summary judgment, a court cannot try issues of fact, it can only determine whether there are issues to be tried. Donahue v. Windsor Locks Ed. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987). Finally, the Supreme Court has directed that allegations contained in a pro se complaint are to be held to less stringent standards than formal pleadings draffed by lawyers. Haines v. Kerner, 404 US. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). Accordingly, when a party seeks summary judgment against a pro se litigant, the Court must afford the nonmovant special solicitude. Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988).

B. Lack of Jurisdiction Over Merits of the Tax Assessments

[1] In order to maintain an action against the United States, the plaintiff must demonstrate that the United States has waived its sovereign immunity and consented to the suit. Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, (1994); United States v. Mitchell, 445 US. 535, 538, (1980). A waiver of sovereign immunity must be unequivocally expressed in an Act of Congress and cannot be implied. Lehman v. Nakshian, 453 U.S. 156, 160-61, (1981). Such waivers are strictly construed in favor of the sovereign. Lane v. Pena, 518 U.S. 187, 192, (1996).

Plaintiff, through this suit, is attempting to challenge the underlying merits of the tax assessments made against him for the tax years 1990, 1991, 1992 and 1993. Generally, however, tax assessments may only be contested in the United States Tax Court or, upon payment of the assessment, in a refund action in federal district court or the Court of Claims. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7,(1962);

Falik v. United States, 343 F.2d 38, 40-43 (2d Cir. 1965).

Plaintiff attempted to proceed in the Tax Court, but his petition was dismissed for lack of jurisdiction. The Tax Court found that the petition was untimely under 26 U.S.C. § 6213(a) because it was not filed within 90 days after the IRS mailed notices of deficiency to plaintiff at the address shown on his most recently filed income tax return, and that the address was the proper address for mailing such notices, because at the time of mailing, the IRS had no reason to know plaintiff had, in fact, moved without leaving a forwarding address. The Tax Court rejected plaintiffs contention that the IRS failed to show that it had sent the deficiency notices to plaintiff by certified mail. The Tax Court's dismissal was affirmed by the Second Circuit Court of Appeals. Follum v. Commissioner of Internal Revenue, 128 F.3d 118 (2d Cir. 1997).

At the present time, plaintiff is barred from pursuing a refund action in this Court. Under 26 U.S.C. § 7422(a), plaintiff may bring a refund action in district court only after paying his tax liability in full and filing a claim for refund with the IRS. See also Flora v. United States, 362 U S . 145, 4 L. Ed. 2d 623, 80 S. Ct. 630 (1960). To date, plaintiff has not fully paid his assessed tax liabilities for 1990, 1991, 1992 and 1993, nor has he filed a claim for refund. Accordingly, the United States has not waived its sovereign immunity for a refund action and the Court lacks jurisdiction to entertain any part of the plaintiffs suit that directly challenges the underlying merits of the tax assessments made against plaintiff for the 1990, 1991, 1992 and 1993 tax years.

C. Anti-Injunction Act

Plaintiff is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a), from obtaining injunctive relief in this case. The Anti-Injunction Act provides that, with certain statutory exceptions not applicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ." "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." Williams Packing, 370 U.S. at 5. Under the Anti-injunction Act, the United States is permitted "to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue." Id. at 7; see also Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37.

In Williams Packing, 370 U.S. at 7, the Supreme Court did enunciate a narrow exception to the bar against suits to enjoin the collection of taxes. The Court stated that the attempted collection may be enjoined "if it is clear that under no circumstances could the Government ultimately prevail" and "if equity jurisdiction otherwise exists." Thus, under Williams Packing, a district court may enjoin the collection of a tax if: (1) the disputed tax assessment is unquestionably incorrect; (2) the plaintiff will suffer irreparable injury if forced to pay; and (3) the plaintiff is without an adequate remedy at law.

The Court finds that the Williams Packing exception to the Anti-Injunction Act does not apply in this case. First, plaintiff has failed to show that under no circumstances could the IRS ultimately prevail. I n fact, as discussed in more detail infra, plaintiffs arguments that the disputed tax assessments are incorrect are totally without merit.

Second, plaintiff has failed to show that he will suffer irreparable harm if forced to pay the disputed tax assessments. Plaintiff claims he will suffer irreparable harm if the injunction is not granted because he is already in a precarious financial position and will have to declare personal bankruptcy if he is forced to pay the taxes. However, other than his own affirmation in support of his preliminary injunction motion, plaintiff has failed to provide any proof of his financial situation. For example, plaintiff has not provided any documentation regarding his income, his assets or his liabilities. He states that he must pay child support and that his family will suffer if he is forced to pay the tax, but he provides no documentation regarding the child support payments and gives no specifics as to his family situation or his family's other sources of income. Plaintiff also states without support that he will be unable to secure a loan to pay the taxes. There is no indication in his papers that he ever tried to secure such a loan. Nor has he provided any information regarding his credit status. The fact that plaintiff may have a difficult time paying the tax and may have to declare personal bankruptcy does not constitute the type of irreparable harm contemplated by the Supreme Court in Williams Packing.

Third, plaintiff has an adequate remedy at law -- he may fully pay his assessed tax liability, file a claim for refund with the IRS and, if the claim is denied (or not acted upon within six months), he may file a complaint in district court or the Court of Claims for a refund. If he is successful in such an action, he will be refunded the payment plus interest. See United States v. Dema, 544 F.2d 1373, 1377 (7th Cir. 1976), cert. denied, 429 US. 1093, (1977). The Court further notes that plaintiff could have pursued his case in Tax Court without first paying the tax, but lost that right when he neglected to provide a forwarding address when he moved. Equity does not favor a plaintiff who puts himself in a precarious situation through his own actions or omissions.

In sum, as the Second Circuit stated in Falik, "a person whose sole claim is that a federal tax assessment was not well grounded in fact and law must 'pay first and litigate later,'" Falik, 343 F.2d at 42 (quoting Flora, 362 US. at 164).

D. Lack of Jurisdiction Over Suit for Wrongful Levy
To the extent that plaintiffs action may be viewed as suit for wrongful levy against the United States, the Court lacks jurisdiction over such a suit because 26 U.S.C. § 7426(a) states, in pertinent part, that "if a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States" (emphasis added). As specifically stated in § 7426(a),

the United States has not waived its sovereign immunity to be sued by the person against whom is assessed the tax out of which the levy arose. Therefore, a wrongful levy suit brought by such person against the United States or its agencies must be dismissed for lack of jurisdiction. McGinness v. United States, 90 F.3d 143, 145 (6th Cir. 1996); Shannon v. United States, 521 F.2d 56, 59 (9th Cir. 1975). Accordingly, in this case, the Court lacks jurisdiction to entertain a wrongful levy action by plaintiff against the United States with regard to the levying of plaintiffs property for satisfaction of the tax assessments for the 1990, 1991, 1992 and 1993 tax years [1].

E. Lack of Jurisdiction Over Quiet Title Action

As stated above, in order to maintain an action against the United States, plaintiff must demonstrate that the United States has waived its sovereign immunity and consented to the suit. Here, plaintiff has styled his amended complaint as an action to quiet title against the United States under 28 U.S.C. § 2410. Section 2410 provides that "the United States may be named a party in any civil action or suit in any district court , . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." Under § 2410, the United States has expressly waived its sovereign immunity for actions to quiet title to property on which it has a lien [2].

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[1] I n addition, the IRS has not yet levied against any property or wages of the plaintiff to satisfy the assessed tax liabilities of the plaintiff for the 1990, 1991, 1992 and 1993 tax years, and the plaintiff has not alleged that the IRS has done so. Accordingly, a suit for wrongful levy, even if otherwise,proper, would not be ripe for adjudication until a levy is made. See 26 U.S.C. § 7426(a).

It is well established, however, that a taxpayer may not use § 2410 to circumvent the Anti-Injunction Act and attack the validity of an underlying tax assessment. Laino v. United States, 633 F.2d 626, 633 n.8 (2d Cir. 1980) (the Anti-injunction Act cannot be circumvented by coloring a complaint as an action to quiet title where the plaintiff clearly seeks to attack the validity of the underlying assessment); Falik, 343 F.2d at 41; see also Hughes v. United States, 953 F.2d 531, 538 (9th Cir. 1992); Lonsdale v. United States, 919 F.2d 1440, 1442-43 (10th Cir. 1990); Fisher v. United States, 860 F. Supp. 680, 683 (D. Ark. 1994). Allowing taxpayers to challenge the substantive validity of tax assessments simply by styling their complaints as quiet title actions would render the Anti-Injunction Act illusory. Accordingly, "courts have rejected attempts by taxpayers to invoke the waiver of sovereign immunity for the purpose of circumventing the time honored 'pay first, litigate later' rule, by framing their contest to the Government's tax assessment or collection actions in the guise of a quiet title action." Lonsdale, 919 F.2d at 1443 (citations omitted).

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[2] In his amended complaint, plaintiff identifies the personal property in which the United States may have or claim a tax lien -- two motor vehicles and the plaintiffs wages from his employer. While it is settled law that present (earned but not yet paid) wages can be subject of a quiet title action, it is unclear whether future (not yet earned) wages can be the subject of a quiet title action. I n Harrell v. United States, 13 F.3d 232, 234 (7th Cir. 1993), the Seventh Circuit held that a taxpayer "has no property right in wages that he has not yet earned, his entitlement to them being contingent on his continued employment. Without a colorable title, [the plaintiff] has no basis for a quiet-title action." (citations omitted).

A narrow exception to this restriction allows a party to use § 2410 to challenge "procedural irregularities" in the assessment process. Johnson v. United States, 990 F.2d 41, 42 (2d Cir. 1993); Kulawy v. United States, 917 F.2d 729, 733 (2d Cir. 1990). The scope of this exception includes "procedural violations arising from assessment, levy and seizure." Guthrie v. Sawyer, 970 F.2d 733, 735 (10th Cir. 1992). A procedural claim is one which does not challenge the "existence or extent of the substantive tax liability." Id. at 736.

In his amended complaint, plaintiff claims that the tax assessments for 1990 and 1991 are barred by the three - year statute of limitations in 26 U.S.C. § 6501(a), and asks that the defendant be permanently enjoined from collecting the tax assessments for those years. He further claims that all the disputed assessments are invalid because the IRS improperly conducted a second investigation of his records, without notice, in violation of 26 U.S.C. § 7605(b), and asks that defendant be enjoined from placing liens on his property to collect on the disputed assessments [3]. When plaintiffs claims are boiled down, it is clear that what he is attempting to do in this lawsuit is to attack the validity of the underlying tax assessments. This is not a case where the taxpayer is simply asking the Court to require the IRS to correct a procedural irregularity. To the contrary, what plaintiff is asking the Court to do here is to declare that the disputed tax assessments are invalid and to permanently enjoin the IRS from collecting on them. Such a challenge is clearly substantive rather than procedural in nature and therefore cannot be brought under § 2410 [4].

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[3] Section 7605(b) provides, in pertinent part, that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the [IRS], after investigation, notifies the taxpayer in writing that an additional inspection is necessary,"

F. Lack of Substantive Merit

Even if it is assumed arguendo that plaintiffs claims in this case deal with "procedural irregularities" rather than the substantive validity of the underlying tax assessments, and that the Court therefore has jurisdiction under § 2410 to hear the claims, summary judgment in favor of the defendant is still appropriate because plaintiffs claims are contrary to the evidence in the record and therefore lack any substantive merit.

Official acts of the IRS are presumed to be procedurally correct. United States v. Ahrens, 530 F.2d 781, 785-86 (8th Cir. 1976). The presumption is defeated only by a showing of clear evidence to the contrary. Id. Plaintiff has failed to make such a showing.

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[4] I n his response to the motion for summary judgment, plaintiff claims that the disputed tax assessments are also invalid because: (1) the assessment officer failed to sign the record of assessment; and (2) the IRS failed to give him timely notice of the tax demand. These claims, however, were not raised in the amended complaint and therefore may not be considered. The Court is mindful of plaintiffs pro se status, but he has already been given an opportunity to amend his complaint. I n any event, plaintiffs claims that the tax assessments are invalid are without merit for the reasons stated by the United States in its reply brief.

Plaintiff argues that the tax assessments made against him for the 1990 and 1991 tax years were untimely. This argument, however, is not supported by the facts in the record.

On December 1, 1992, plaintiff filed a Form 5213 with the IRS. The Form 5213 was signed by the plaintiff and dated October 16, 1992. Filing the Form 5213 is the means by which a taxpayer elects to postpone, for a certain number of years, the determination as to whether a certain activity is engaged in for profit, for purposes of applying 26 U.S.C. § 183 [5]. The Form 5213 provides that if a taxpayer makes the election, "the determination is postponed until the close of: (a) the 6th tax year, for an activity that consists mainly of breeding, training, showing, or racing horses; or (b) the 4th year for any other activity, after the tax year in which the taxpayer first engaged in the activity." See Item No. 20, Exhibit 9.

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[5] Specifically, the Form 5213 is the IRS form for taxpayers to make the election as provided under 26 U.S.C. §§ 183(e)(l) and *(3)*. Section 183 is the Internal Revenue Code Section that generally disallows deductions for activities not engaged in for profit (which are more commonly known as "hobby losses").
26 U.S.C. 5 183(e) provides as follows:
(e) Special Rule.--
(1) I n general.-- A determination as to whether the presumption provided by subsection (d) applies with respect to any activity shall, if the taxpayer so elects, not be made before the close of the fourth taxable year (sixth taxable year, in the case of an activity described in the last sentence of such subsection) following the taxable year in which the taxpayer first engages in the activity. For purposes of the preceding sentence, a taxpayer shall be treated as not having engaged in an activity during any taxable year beginning before January 1, 1970.

On the Form 5213, the plaintiff described the activity for which he elected to postpone the "for profit" determination as "Tournament Sport Fishing -- The activity consists of fishing the various tournaments with the intent of earning income from these events." Id. The plaintiff also indicated on this form that the first

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(2) Initial period.-- If the taxpayer makes an election under paragraph (l), the presumption provided by subsection (d) shall apply to each taxable year in the 5-taxable year (or 7-taxable year) period beginning with the taxable year in which the taxpayer first engages in the activity, if the gross income derived from the activity for 3 (or 2 if applicable) or more of the taxable years in such period exceeds the deductions attributable to the activity (determined without regard to whether or not the activity is engaged in for profit).
(3) Election.-- An election under paragraph (1) shall be made at such time and manner, and subject to such terms and conditions, as the Secretary may prescribe.
(4) Time for assessing deficiency attributable to activity.-- If a taxpayer makes an election under paragraph (1) with respect to the activity, the statutory period for the assessment of any deficiency attributable to such activity shall not expire before the expiration of 2 years after the date prescribed by law (determined without extensions) for filing the return of tax under chapter 1 for the last taxable year in the period of 5 taxable years (or 7 taxable years) to which the election relates. Such deficiency may be assessed notwithstanding the provisions of any law or rule of law which would otherwise prevent such an assessment. (emphasis added).

tax year in which he engaged in this activity was 1990. Id.

Under 26 U.S.C. § 183(e)(4), if a taxpayer elects to postpone the determination of whether an activity is engaged in for profit, then the statutory period for making assessments with regard to that activity does not expire until two years after the end of the five-taxable-year period to which the election applies. Because the plaintiff elected to postpone the determination of whether his "tournament sport fishing" activity was engaged in for profit, beginning with the 1990 tax year, the statute of limitations for making tax assessments with regard to that activity for the 1990 and 1991 tax years did not expire until April 15, 1997 [6]. The Notice of Deficiency for tax year 1990 and the Notice of Deficiency for tax years 1991, 1992 and 1993 were both dated November 3, 1995. I n both of these Notices, the IRS explained that the adjustments in the plaintiffs tax liability for these years were the result of the disallowance of certain Schedule C losses attributable to the plaintiffs "tournament sport fishing" activity which the IRS had determined was not engaged in for profit. On April 8, 1996, the IRS made tax assessments against the plaintiff based on these adjustments. Accordingly, these tax assessments were not made after the expiration of the statute of limitations as alleged by plaintiff in his amended complaint.

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[6] The Court calculated this date in the following manner. Plaintiffs election applied for the tax years beginning 1990 through 1994. The tax return for 1994 was due, without extensions, on April 15, 1995. Under 26 U.S.C. § 183(e)(4), the statute of limitations for making assessments with regard to that activity for the years 1990 through 1994 remained open for the greater of the period of time as provided in 26 U.S.C. § 6501 or two years after April 15, 1995.

Plaintiff argues that the filing of the Form 5213 did not constitute a "waiver" of the statute of limitations because the IRS did not sign the Form 5213. There was no requirement, however, for the IRS to sign the Form 5213 in order for it to be effective. As stated above, the Form 5213 is the IRS form used by taxpayers to make the election under 26 U.S.C. § 183(e)(l) to postpone the determination as to whether a certain activity is engaged in for profit. This election is one statutorily available to the taxpayer, and the IRS has no power or authority to prevent a taxpayer from making this election. Thus, once a taxpayer signs and files a Form 5213, the three-year statute of limitations under § 6501(a) is automatically extended by operation of law. See 26 U.S.C. § 183(e)(4). There is no requirement that the Form 5213 be signed by the IRS, as the election is made by the taxpayer unilaterally.

Plaintiff next argues that the disputed tax assessments are void because the IRS made a second inspection of his books and records, without his knowledge or consent, in violation of 26 U.S.C. § 7605(b). Plaintiff alleges in his amended complaint that the "IRS considers an audit with a taxpayer and the examination of the taxpayer's books and records for the year or years under examination completed when the taxpayer is notified in writing of an adjustment to his tax liability . . . . Therefore the first examination and determination of a tax deficiency for years 1990, 1991, 1992 and 1993 took place in April and June of 1994 and was concluded when the IRS sent the plaintiff the thirty (30) day letter dated 21 June 1994 [7]." He also alleges that the IRS mailed him a letter dated August 29, 1995, instructing him to appear for an office audit and to bring all records needed to verify his Schedule C business expenses for 1990, 1991, 1992 and 1993. He further alleges that the IRS sent a thirty-day letter to him on September 27, 1995 proposing adjustments to his federal income taxes for years 1990, 1991, 1992 and 1993. From these facts, plaintiff argues that the IRS improperly undertook a second examination of his books and records, and that this second inspection renders the underlying tax assessments null and void. The Court finds this argument without merit.

As stated above, on December 1, 1992, plaintiff filed with the IRS a Form 5213 dated October 12, 1992, electing to postpone a determination of whether his "tournament sport fishing" activity was engaged in for profit until after the close of the 1994 tax year. By doing so, the plaintiff consented to have his books and records inspected with regard to that activity after the expiration of the five-year period to which the election applied.

By filing the Form 5213, plaintiff prevented the IRS from closing its first investigation with regard to his

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[7] The term "thirty-day letter" refers to a Notice of Proposed Deficiency. The thirty-day letter referenced by plaintiff here was actually dated June 24, 1994 rather than June 21, 1994.

"tournament sport fishing" activity [8]. Therefore, the IRS did not improperly make a second inspection of the plaintiffs books and records when it sent him the letter dated August 29, 1995, requesting him to appear and bring documentation to support his Schedule C deductions for his "tournament sport fishing" activity for the tax years 1990, 1991, 1992 and 1993. The IRS was simply continuing the inspection of that activity for those tax years that it had originally begun in 1992[9].

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[8] Plaintiff does not allege in his amended complaint that the IRS sent him a Notice of Deficiency (commonly known as a "ninety-day letter") prior to the mailing of the second "thirty-day letter" in September 1995. Only a ninety-day letter makes a final adjustment to a taxpayer's tax liability (because a thirty-day letter only gives notice regarding a proposed adjustment). I n any event, 26 U.S.C. § 183(e)(4) provides that if a taxpayer makes an election to postpone the "for profit" determination under § 183, the deficiency ultimately arising as a result of that postponement "may be assessed notwithstanding the provisions of any law or rule of law which would otherwise prevent such assessment." See also 26 U.S.C. § 6212(c)(2)(C) (provides a cross-reference to § 183(e)(4) as an exception to the general rule in § 6212(c)(1), which states that the IRS may not determine any additional deficiency for the same tax year once the IRS mails a ninety-day letter to a taxpayer and the taxpayer timely files a petition with the Tax Court).

[9] Plaintiff further alleges in his amended complaint that the IRS improperly issued an administrative summons upon him, citing United States v. Powell, 379 US. 48, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964). However, plaintiff has not alleged any further facts or presented any evidence which supports the contention that the IRS issued an administrative summons in this case. I n any event, even if a summons was issued, such fact would have no bearing on the outcome of this case.

CONCLUSION

This Court is without jurisdiction to consider plaintiffs attack on the merits of the disputed tax assessments. Further, the Court finds that in light of the lack of probative contrary evidence, plaintiffs filing of a Form 5213 effectively extended the statute of limitations period and allowed the IRS to continue its inspection of plaintiffs books and records. Therefore, the Court finds that there is no genuine issue as to any material fact and summary judgment is appropriate in this case. Accordingly, the Clerk of Court is hereby ordered to enter judgment in favor of defendant and to take all steps necessary to close the case.

IT IS SO ORDERED.

Honorable Richard J. Arcara, United States District Court

Dated: March 3, 1999

WARREN RICHARD FOLLUM, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

98-CV-0 126A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

8 1 A.F.T.R.2d 2008

Decided and Filed: April 29, 1998

1. Quiet title action - assessment and collection - failure to state claim for relieve - Anti-Injunction act; sovereign immunity. Pro se taxpayer's quiet title action contesting tax assessments and collection was dismissed for failure to state claim: taxpayer's claims that IRC § 6501(a) limitations period barred assessments and that assessments were void where IRS improperly conducted 2d investigation without notice under IRC § 7605(b) contested substantive validity of assessments and couldn't be brought under 28 § 2410. Also, AIA barred injunction for tax collection: taxpayer didn't show irreparable harm where he didn't prove that he would be forced to file bankruptcy, was required to pay child support, and attempted to secure loan: and had adequate remedy at law in form of refund after payment. And, IRS District Director, not US, was proper defendant where sovereign immunity wasn't waived. Reference: United States Tax Reporter ¶ 74,336.507(3); 74,215.03(45); 74,336.507(10).
IRC § 7421

DISPOSITION: Plaintiffs motion for preliminary injunction denied.
COUNSEL: Warren Richard Follum, petitioner, pro se, Lewiston, NY. **For United States** of America, respondent: Jane B. Wolfe, Esq., United States Attorney,

Buffalo, NY, William M. Kostak, Esq., Department of Justice, Washington, DC.
JUDGES: Honorable Richard J. Arcara, United States District Court
OPINION BY: Honorable Richard J. Arcara
OPINION: DECISION AND ORDER[1]

INTRODUCTION

Plaintiff commenced this action pro se on February 24, 1998, against the defendant United States, seeking relief under 28 U.S.C. § 2410 [2]. Plaintiff claims that the United States Internal Revenue Service ("IRS") has improperly assessed that plaintiff owes taxes for the tax years 1990, 1991, 1992, and 1993. More specifically plaintiff claims that the tax assessments regarding 1990 and 1991 are barred by the three-year statute of limitations in 26 U.S.C. § 6501(a). He further claims that all the disputed assessments are null and void because the IRS improperly conducted a second investigation of his records, without notice, in violation of 26 U.S.C. § 7605(b). Plaintiff asks that the Court declare the disputed assessments null and void.

On March 10, 1998, plaintiff filed a motion for a preliminary injunction, seeking an order from the Court enjoining defendant from "proceeding with tax levy/liens against the plaintiff for the tax years 1990, 1991, 1992 and 1993 until a final disposition" of this case on the merits. Defendant filed a response opposing the motion on March 20, 1998. Plaintiff filed a reply on March 23, 1998 [3]. Oral argument on the preliminary injunction motion was held on April 9, 1998.

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[1] The Court originally issued a Decision and Order filed April 16, 1998 denying plaintiffs motion for a preliminary injunction. That Decision and Order is hereby vacated in light of additional information received by the Court and discussed herein.

[2] Section 2410 provides that "the United States may be named a party in any civil action or suit in any district court . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien."

After reviewing the submissions of the parties and hearing oral argument, the Court denies plaintiffs motion for a preliminary injunction, The following discussion constitutes the Court's finds of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

DISCUSSION

[1] Generally, tax assessments must be contested in the United States Tax Court or, upon payment of the assessment, in a refund action in federal district court or the Court of Claims. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, (1962); Falik v. United States, 343 F.2d 38, 40-43 (2d Cir. 1965). I n this case, plaintiff attempted to proceed in the Tax Court but his petition was dismissed for lack of jurisdiction [4]. The

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[3] The government filed a second copy of its response on April 7, 1998.

[4] When the Court issued its Decision and Order filed April 16, 1998, it was unaware of the fact that plaintiff had attempted to proceed in the Tax Court. Neither the plaintiff nor the government mentioned this fact in their papers or at oral argument. Although plaintiff should have mentioned this fact in his complaint, the

Tax Court found that the petition was untimely under 26 U.S.C. § 6213(a) because it was not filed within 90 days after the IRS mailed notices of deficiency to plaintiff at the address shown on his most recently filed income tax return, and that the address was the proper address for mailing such notices because at the time of mailing the IRS had no reason to know plaintiff had, in fact, moved without leaving a forwarding address. The Tax Court rejected plaintiffs contention that the IRS failed to show that it had sent the deficiency notices to plaintiff to plaintiff by certified mail. The Tax Court's dismissal was affirmed by the Second Circuit Court of Appeals. Follum v. Commissioner of Internal Revenue, 128 F.3d 118 (2d Cir. 1997). Plaintiff claims that he cannot pursue a refund action because he cannot afford to pay the tax deficiency first.

The statute under which plaintiff claims jurisdiction, 28 U.S.C. § 2410, authorizes civil actions against the United States to quiet title to "real or personal property on which the United States has or claims a mortgage or other lie'n."[5] This section does not allow a taxpayer to collaterally attack the substantive validity of the

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Court will not consider sanctions in view of plaintiffs pro se status and because the government also failed to bring this fact to the Court's attention.

[5] A tax assessment results automatically in a lien on the taxpayer's property. See 26 U.S.C. § 6321; Kulawy v. United States, 917 F.2d 729, 733 (2d Cir. 1990). The parties agreed at oral argument that the IRS has not actually taken any steps to file or enforce a lien against any of plaintiffs property.

underlying tax assessment that led to the lien, Falik, 343 F.2d at 41, but does permit challenges premised on "procedural irregularities" in the seizure and sale of his property following such an assessment. Johnson v. United States, 990 F.2d 41, 42 (2d Cir. 1993); Kulawy, 917 F.2d 729 at 733. "A procedural claim is one which does not challenge the existence or extent of substantive tax liability." Johnson, 990 F.2d at 43 (citation omitted).

Here, plaintiff claims that the tax assessments regarding 1990 and 1991 are barred by the three-year statute of limitations in 26 U.S.C. § 6501(a), and asks that the defendant be enjoined from collecting the tax assessments for those years. He further claims that all the assessments are null and void because the IRS improperly conducted a second investigation of his records, without notice, in violation of 26 U.S.C. § 7605(b) [6]. Although not clearly stated, plaintiff appears to be requesting that as a remedy for the government's alleged violation of § 7605(b), the Court permanently enjoin the collection of the disputed assessments. See Complaint at 10-11 (citing Reineman v. United States, 301 F.2d 267, 271-72 (7th Cir. 1962) (where a taxpayer is totally unaware that a reexamination of its tax return is in progress and thus is unable either to refuse disclosure of its books or otherwise stop the reexamination process, the illegal reexamination can be treated as defeating the deficiency and entitling a taxpayer who has paid the tax to a refund without reference to the tax-merit of the government's case)). Thus, in essence, what plaintiff is seeking in this case is a declaration by this Court that he does not have to pay the taxes that the IRS says he owes. Such a challenge is clearly substantive rather than procedural in nature and therefore cannot be brought under § 2410. Thus, plaintiffs complaint fails to state a claim upon which relief may be granted.

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[6] Section 7605(b) provides, in pertinent part, that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the [IRS], after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

Even if it were assumed arguendo that section 2410 is applicable in this case, the Court would deny the motion for a preliminary injunction under the facts and circumstances present here. Plaintiffs attempt to enjoin collection of his federal tax liabilities is prohibited by the Anti-Injunction Act, 26 U.S.C. § 7421(a), which provides that" . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . ." "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." Williams Packing, 370 US. at 5.

The Supreme Court, in Williams Packing, 370 US. at 7, enunciated a narrow exception to the bar against suits to enjoin the collection of taxes. The Court stated that the attempted collection may be enjoined "if it is clear that under no circumstances could the Government ultimately prevail" and "if equity jurisdiction otherwise exists." Thus, under Williams Packing, a district court may enjoin the collection of a tax if (1) the disputed tax assessment is unquestionably incorrect, (2) the plaintiff will suffer irreparable injury if forced to pay, and (3) the plaintiff is without an adequate remedy at law. Plaintiff claims that his situation falls within the Williams Packing exception. The Court disagrees[7].

Plaintiff has failed to establish by a preponderance of the evidence that he will suffer irreparable harm if forced to pay the disputed tax assessments. Plaintiff claims he will suffer irreparable harm if the injunction is not granted because he is already in a precarious financial position and will have to declare personal bankruptcy if he is forced to pay the taxes. However, other than his own affirmation in support of his motion, plaintiff has failed to provide any proof of his financial situation. For example, plaintiff has not provided any documentation regarding his income, his assets or his liabilities. He states that he must pay child support and that his family will suffer if he is forced to pay the tax, but he provides no documentation regarding the child support payments and gives no specifics as to his family situation or his family's other sources of income. Plaintiff also states without support that he will be unable to secure a loan to pay the taxes. There is no indication in his papers that he has tried to secure such a loan. Nor has he provided any information regarding his credit status. The burden is on plaintiff as the party seeking the injunction to prove by a preponderance of the evidence that he will suffer irreparable harm if the injunction is not granted. He has failed to meet this burden. The fact that plaintiff may have a difficult time paying the tax and may have to declare personal bankruptcy does not constitute the type of irreparable harm contemplated by the Supreme Court in Williams Packing.

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[7] The Court has been provided with little or no evidence regarding the merits of the disputed tax assessments. Plaintiff has provided only a sketchy outline of the issues, and it was apparent from the oral argument that he failed to mention in his papers several facts potentially relevant to the merits of the dispute. For instance, it was brought up for the first time at oral argument that plaintiff apparently signed a waiver of the statute of limitations at some point during the assessment process. Further, plaintiff stated for the first time at oral argument that his former wife may have given consent for a second review of his financial records. The government indicated at oral argument that it was unprepared to discuss the merits of the plaintiffs arguments regarding the validity of the tax assessments because it had not yet been able to retrieve the IRS file regarding plaintiffs case from its file repository. Based on this lack of evidence, the Court is unable to make a determination one way or the other regarding the merits of the parties' respective positions.

Moreover, plaintiff still has an adequate remedy at law in that he may pursue a refund action after payment. If he is successful in such an action, he will be refunded the payment plus interest. See United States v. Dema, 544 F.2d 1373, 1377 (7th Cir. 1976), cert. denied, 429 U.S. 1093, (1977). The Court further notes that plaintiff could have pursued his case in Tax Court without first paying the tax, but lost that right when he neglected to provide a forwarding address when he moved. Equity does not favor a plaintiff who puts himself in a precarious situation through his own actions or omissions.

The Court further finds that the motion for a preliminary injunction must be denied because such relief is not available against the United States, the only named defendant in this case. I n Falik, 343 F.2d at 43, the Second Circuit held that any action for an injunction against the collection of taxes must be brought against the District Director of the IRS rather than the United States, because the United States has not waived sovereign immunity and consented to be sued for such relief. See also Shaw v. United States, 321 F. Supp. 1267, 1269 (D. Vt. 1970).

The bottom line in this case, as the Second Circuit stated in Falik, is that "a person whose sole claim is that a federal tax assessment was not well grounded in fact and law must 'pay first and litigate later.'" Falik, 343 F.2d at 42 (quoting Flora v. US., 362 U.S. 145, 164, 5 AFTR 1046 (1960)).

CONCLUSION

For the reasons stated, the Court denies plaintiffs motion for a preliminary injunction.

IT IS SO ORDERED.

Honorable Richard J. Arcara, United States District Court
Dated: April 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 178 August Term, 1997
Docket No. 97-4011
WARREN RICHARD FOLLUM, Petitioner-Appellant,
- v. - COMMISSIONER OF INTERNAL REVENUE,
Respondent- Appellee.
Argued: October 6, 1997 Decided: November 3, 1997
128 F.3d 118

Taxpayer filed petition for redetermination of income tax deficiencies. The United States Tax Court, Peter J. Panuthos, Judge, 1996 WL 601854, dismissed petition as untimely, and taxpayer appealed. The Court of Appeals held that (1) IRS satisfied its obligation to send notices of income tax deficiency to taxpayer's last known address, and (2) notices were sent by certified mail.

Affirmed

1. Internal Revenue -- 4730
Factual findings of tax court must be upheld on appeal unless they are clearly erroneous.

2. Internal Revenue -- 4705
Tax Court's rulings of law are reviewed de novo.

3. Internal Revenue – 4547
To collect deficiency in income tax, Commissioner of Internal Revenue must have mailed notice of deficiency by certified or registered mail to taxpayer at his last known address, which is address where Commissioner reasonably believed taxpayer wished to be reached. 26 USC § 6212(b)(1)

4. Internal Revenue – 4547
Address shown on taxpayer's most recently filed income tax return is his last known address, to which notice of deficiency should be mailed, unless taxpayer has sent notice of change

of address. 26 USC § 6212(b)(1)

5. Internal Revenue – 4547
Reasonableness of Commissioner of Internal Revenue's belief as to what is taxpayer's last known address is to be assessed as of time IRS mailing of notice of deficiency. 26 USC § 6212(b)(1)

6. Internal Revenue – 4547
Commissioner of Internal revenue has obligation to exercise reasonable diligence to ascertain taxpayer's correct address if prior to mailing income tax deficiency notice she has become aware that address last known to agency may be incorrect; but if IRS has been given no reason to believe that address shown on taxpayer's last filed income tax return is no longer current, mailing of notice of deficiency to that address is proper. 26 USC § 6212(b)(1)

7. Internal Revenue – 4547
It is the responsibility of taxpayer to provide clear and concise notification to IRS of any change of address, for purposes of Commissioner of Internal Revenue's obligation to mail notice of tax deficiency to taxpayer's last known address. 26 USC § 6212(b)(1)

8. Internal Revenue – 4651
Whether or not notice of income tax deficiency is actually received by taxpayer, 90-day period for filing tax court petition begins upon proper mailing of notice by IRS. 26 USC § 6213(a)

9. Internal Revenue – 4651
After proper mailing of notice of income tax deficiency by IRS, its remailing of notice to new address after receipt of information that address it used had become inoperative does not afford taxpayer revived or extended 90 – day period for seeking redetermination in tax court. 26 USC § 6213(a)

10. Internal Revenue – 4547
IRS satisfied its obligation to send notice of income tax deficiency to taxpayer's last known address, thus

commencing 90 – day period for filing tax court petition, by sending notices to post office box given as address on taxpayer's most recent income tax return, and resending them to prior address when they were returned as undeliverable, where taxpayer did not yet provide IRS with new address. 26 USC § 6212(b)(1),§ 6213(a).

11. Internal Revenue – 4547
Tax court had discretion to accept certified mail list maintained by IRS as sufficient proof that notices of income tax deficiency were sent by certified mail. 26 USC § 6212(b)(1).

COUNSEL: Warren R. Follum, Lewiston, New York, Petitioner-Appellant pro se; **For the United States of** America, Randolph L. Hutter, Bruce R. Ellisen, Tax Division, Department of Justice, Washington, D.C., Loretta C . Argrett, Assistant Attorney General, for Respondent-Appellee.
BEFORE: Kearse, Miner, and Cabranes, Circuit Judges .

Per Curiam :
Petitioner Warren Richard Follum appeals from a decision of the United States Tax Court, Peter J. Panuthos, Judge, dismissing as untimely his petition for redetermination of income tax deficiencies. The tax court found that the petition was untimely because it was not filed within 90 days after respondent Commissioner of Internal Revenue ("Commissioner" or "IRS") mailed notices of deficiency to Follum at the address shown on his most recently filed income tax return, and that that address was the proper address for mailing such notices because at the time of mailing the Commissioner had no reason to know that Follum had moved. The court rejected Follum's contention that

the IRS failed to show that it had sent the deficiency notices to Follum by certified mail. Follum challenges these rulings on appeal. Finding no basis for reversal, we affirm substantially for the reasons stated in Judge Panuthos's Memorandum Opinion dated October 22,1996, reported at 72 T.C.M. (CCH) 1076,1996 WL 601 854 (1996).

[1,2] The factual findings of the tax court must be upheld on appeal unless they are clearly erroneous. *See, G,* Commissioner v. Duberstein, 363 U.S. 278,289-91 (1960); Andrew Crispo Gallery. Inc. v. Commissioner, 16 F.3d 1336, 1340-41 (2d Cir. 1994); DeMartino v. Commissioner, 862 F.2d 400,406 (2d Cir. 1988). The tax court's rulings of law are reviewed de novo. See, e.g, Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975,979 (2d Cir.), cert. denied, 502 U.S. 957 (1991). We see no basis for overturning the tax court's findings of fact or conclusions of law in the present case.

[3,4] In order to collect a deficiency in income tax, the Commissioner must have mailed a notice of deficiency by certified or registered mail to the taxpayer at his last known address. 26 USC. §9 6212(a), (b)(l); see e.g., Hoffenbern v. Commissioner, 905 F.2d 665,666 (2d Cir. 1990) (per curiam). The taxpayer's "last known address is the address where the Commissioner reasonably believed the taxpayer wished to be reached." Tadros v. Commissioner, 763 F.2d 89,91 (2d Cir. 1985) (internal quotation marks omitted). The address shown on the taxpayer's most recently filed return is his last known address unless the taxpayer has sent a notice of change of address. See id. at 92 (taxpayer's filing of a return

listing a new address would constitute notice to the IRS of an address change).

[5-7] The reasonableness of the Commissioner's belief as to what is the taxpayer's last known address is to be assessed as of the time of the IRS mailing. see, e.g., Gaw v. Commissioner, 45 F.3d 461,465 (D.C. Cir. 1995); Ward v. Commissioner, 907 F.2d 5 17,521 (5th Cir. 1990). The Commissioner has an obligation to exercise reasonable diligence to ascertain the taxpayer's correct address if prior to mailing the deficiency notice she has become aware that the address last known to the agency may be incorrect. See Gaw v. Commissioner, 45 F.3d at 465; Tadros v. Commissioner, 763 F.2d at 91-92. But if the IRS has been given no reason to believe that the address shown on the taxpayer's last filed income tax return is no longer current, the mailing of a notice of deficiency to that address is proper. It is the responsibility of the taxpayer to provide clear and concise notification to the IRS of any change of address. See id. at 91.

[8,9} In order to challenge the IRS's deficiency determination in tax court, a taxpayer within the United States must file his petition in that court within 90 days after the IRS notice of deficiency was mailed. 26 U.S.C. 6 6213(a). Whether or not the notice is actually received by the taxpayer, the 90-day period begins upon a proper mailing by the IRS. See, e.g., Tadros v. Commissioner, 763 F.2d at 91. After a proper mailing of the notice by the IRS, its remailing of the notice to a new address after receipt of information that the address it used had become inoperative does not afford the taxpayer a revived or extended opportunity to seek a redetermination in tax court. After expiration of the 90-day period without a timely challenge in tax court, the taxpayer's recourse is to pay the deficiency and commence an action in federal district court requesting a refund. 26 U.S.C. 5 7422; Tadros v. Commissioner, 763 F.2d at 91.

[10] In the present case, Follum resided in Rochester, New York, until April 1995; he filed federal income tax returns for the years 1990, 1991, 1992, and 1993 (the "tax years") showing a Rochester address. In March 1995, he moved to Wilmington, North Carolina ("Wilmington"), and he filed his 1994 federal income tax return showing P.O. Box 3673, Wilmington, as his address. In early August 1995, Follum moved to Lewiston, New York, and closed his Wilmington post office box. However, he did not so inform the IRS and did not prior to 1996 give the IRS notice that he intended that agency to correspond with him at any address other than the Wilmington address.

On August 29, 1995, the IRS mailed a letter to Follum at the Wilmington address, stating that his returns for the tax years had been selected for audit. On September 27, 1995, the IRS sent Follum a letter proposing adjustments to his taxes for those years. Follum maintains that he did not receive either of those letters. However, it was the IRS's practice to retain any returned envelopes in the pertinent taxpayer's file, and the tax court found that the IRS files did not contain the envelopes from those mailings, nor any other evidence to suggest that either letter was returned to the agency. No evidence was submitted to contradict this finding. Accordingly, there was no evidence that in the fall of 1995 the IRS was aware that its August and September mailings had not reached Follum and no basis during that period on which it should have suspected that the Wilmington address was not his current address.

On November 3, 1995, the IRS mailed to Follum at the Wilmington address two notices of deficiency, in a single envelope, covering the four tax years. On February 23, 1996, the envelope containing the deficiency notices was returned to the IRS undelivered, with a notation that the post office box had been closed and that the mail could not be forwarded. After searching third-party records such as W-2 forms, the IRS promptly remailed the notices to Follum's old Rochester address; from there they were forwarded to Follum in Lewiston, where he received them on March 6, 1996. By the time he received the notices, the 90-day period set by § 6213(a) for a redetermination suit in tax court had long passed.

The tax court found that the IRS had mailed the notices of deficiency to Follum's last known address and did not fail to exercise reasonable diligence to ascertain a new address for him. Since Follum conceded that he had not notified the IRS that he could no longer be reached at the Wilmington address shown on his 1994 return, and since there was no evidence that the IRS's August and September 1995 mailings to him at that address were returned to the IRS, the agency had no reason when it mailed the notices of deficiency to suspect that the Wilmington address was incorrect. We see no basis on which to overturn the tax court's findings. Because Follum did not file his tax court petition by February 1 , 1996, i.e., 90 days after November 3, 1995, the tax court properly ruled that it was without jurisdiction to entertain Follum's petition.

[11] Follum also contends that the 90-day period did not begin in November 1995 because there was insufficient proof that the IRS sent the notices of deficiency by certified mail. We disagree. The IRS presented to the tax court a list of its November 3, 1995 certified mailings of deficiency notices ("Certified Mail List" or "List"), compiled in accordance with its regular practices. The Certified Mail List, stamped by the post office and initialed by a postal employee, states that it is a receipt for certified mail sent on the date indicated by the postmark stamped on it. The List introduced by the IRS in the present case bears a circular postmark showing (a) the letters "USPS," (b) the city where the post office was located, and (c) the date November 3, 1995. Follum introduced a photocopy of part of the front of the envelope originally used to mail the notices of deficiency to him, which revealed a postage meter stamp showing the same city and date that appear in the postmark on the Certified Mail List, and postage paid in the amount of $3.26. Although Follum's partial photocopy of the envelope did not reveal a certified mail stamp, the Commissioner offered to introduce the envelope itself, the bottom of which bore an IRS stamp labeling it certified mail. The tax court ruled that introduction of the envelope itself was not necessary. Follum neither objected to the Certified Mail List nor presented any evidence to suggest that the List was inaccurate. We conclude that it was well within the discretion of the tax court to accept the Certified Mail List as sufficient proof that the notices of deficiency had been sent to Follum on November 3, 1995, by certified mail. Accord Keado v. United States, 853 F.2d 1209, 1213-14 (5th Cir. 1988); United States v. Ahrens, 530 F.2d 781,784-85 (8th Cir. 1976).

Follum makes several additional arguments that were not made to the tax court. Those arguments are not properly before us, and Follum has made no showing that they must be considered in order to avoid a manifest injustice. See generally Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, b, 54 F.3d 69, 73 (2d Cir. 1995); In re Teltronics Services, Inc., 762 F.2d 185, 192 (2d Cir. 1985). Accordingly, we decline to address them.

CONCLUSION

We have considered all of Follum's contentions that are properly before us and have found them to be without merit. The decision of the tax court dismissing the petition for lack of jurisdiction is AFFIRMED.

Tax Court Memorandum Decisions
Warren Richard Follum v Commissioner
Docket No. 7975-96
72 TCM 1076
Filed: 22 October 1996

[Code Sec. 6213]

Notice of deficiency: Last known address: Address on last-filed return: Restraint on collection: Jurisdiction-Deficiency notices that were mailed to the address appearing on the last tax return filed by an individual before the notices were mailed were mailed to the individual last known address. His last known address was not the address listed on his returns for the years at issue. There was no evidence that the IRS was aware of the taxpayer's address change since nothing in IRS records indicated that letters sent earlier by the IRS to the taxpayer were returned undelivered. Further, since the taxpayer's petition was not timely filed, his motion to restrain collection was denied. Jurisdiction to restrain collection is limited to cases in which a timely petition has been filed.

Warren Richard Follum, pro se. Jordan S. Musen and Paul G. Topolka, for the respondent.

MEMORANDUM OPINION

PANUTHOS, Chief Special Trial Judge: This case was assigned pursuant to the provisions of section

7443A(b)(3) and Rules 180, 181, and 183[1]

This matter is before the Court on respondent's motion to dismiss for lack of jurisdiction, petitioner's motion to dismiss for lack of jurisdiction, and petitioner's motion to restrain collection. Although respondent contends that this case must be dismissed on the ground that petitioner failed to file his petition within the 90-day period prescribed in section 6213(a), petitioner argues that dismissal should be based on respondent's failure to issue a valid notice of deficiency under section 6212. There being no question that we lack jurisdiction over the petition filed herein, we must resolve the parties' dispute respecting the proper ground for dismissal. Because we lack jurisdiction in this case, it follows, as discussed in greater detail below, that we likewise lack authority to restrain collection in this case.

Background

In June 1994, respondent mailed a letter to petitioner at 274 Stoneycreek Drive, Rochester, New York (the Rochester address), proposing adjustments to his Federal income taxes for years 1991, 1992, and 1993. Petitioner listed the Rochester address on his tax returns for years 1990, 1991, 1992, and 1993 and continued to reside at that address until April 1995.

In April 1995, petitioner moved to Wilmington, North Carolina, in search of work. In the meantime, petitioner filed his 1994 Federal income tax return in March 1995 listing his address as P.O. Box 3673, Wilmington, North Carolina 28406-0673 (the Wilmington address).

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[1] All sections references are to the Internal Revenue Code in effect for the years in issue, unless otherwise indicated. All Rule references are to the Tax Court Rules of Practice and Procedures

In early August 1995, petitioner closed the Wilmington post office box and moved to 4997 Creek Road, Lewiston, New York (the Lewiston address).

On August 29, 1995, respondent mailed a letter to petitioner at the Wilmington address stating that petitioner's tax returns for 1990, 1991, 1992, and 1993 had been selected for audit and requesting the petitioner appear at respondent's offices in Wilmington on September 26, 1995. Petitioner maintains that he did not receive this letter. Respondent's files do not indicate that the letter was returned to respondent undelivered.

On September 27, 1995, respondent issued a second letter to petitioner at the Wilmington address proposing adjustments to petitioner's taxes for the years 1990, 1991, 1992 and 1993. Petitioner maintains that he did not receive this letter. Respondent's files do not indicate that the letter was returned to respondent undelivered.

On November 3, 1995, respondent mailed two separate notices of deficiency[2] to petitioner determining deficiencies in and an addition to his Federal income taxes for the taxable years 1990, 1991, 1992, and 1993 as follows:

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[2] One of the notices includes the determination for 1990, and the other notice includes the determination for 1991, 1992 and 1993.

Year	Deficiency	Addition to Tax Sec. 6551(a)(1)
1990	$4,107	---
1991	$7,233	---
1992	$4,790	$832
1993	$3,232	---

The notices of deficiency were mailed to petitioner in a single envelope addressed to petitioner at the Wilmington address as listed in petitioner's 1994 tax return - the last return filed by petitioner prior to the mailing of the above - described notices of deficiency.

Petitioner concedes that he did not provide respondent with notice of his change of address to the Lewiston address between the time that he filed his 1994 tax return and the date that respondent mailed the above-described notices of deficiency.

On February 23, 1996, the envelope bearing the notices of deficiency was returned to respondent undelivered and marked "BOX CLOSED UNABLE TO FORWARD RETURN TO SENDER". There is no explanation in the record why it took the US Postal Service over 3 months to return to respondent the envelope bearing the undelivered notices of deficiency. In any event, upon receipt of the undelivered notices of deficiency, respondent's agents conducted a computer search in an effort to obtain petitioner's correct address. As a result of that search, and relying upon information reported to respondent by third parties on Forms 1099 and W-2, respondent mailed copies of the notices of deficiency to petitioner at the Rochester address. Apparently there was an outstanding forwarding request with the US Postal Service from the Rochester address to the

Lewiston address. Petitioner received the copies of the notices sent at this point when they were forwarded to the Lewiston address.

Petitioner filed a petition for redetermination with the Court on April 29, 1996. The petition was delivered to the Court in an envelope bearing a US Postal Service postmark of April 24, 1996[3]

On June 17, 1996, respondent mailed separate notices of intent to levy to petitioner in respect of his tax liabilities for 1990, 1991, 1992 and 1993. These notices were mailed to petitioner at the Lewiston address.

As indicated, respondent filed a motion to dismiss for lack of jurisdiction alleging that petitioner failed to file his petition within the 90-day period prescribed in section 6213(a). Petitioner filed both and objection to respondent's motion to dismiss and his own motion to dismiss for lack of jurisdiction alleging that the notices of deficiency were not mailed to his correct address. petitioner asserts that his last known address appearing is the Rochester address - the address appearing on the tax returns for the years in issue. In addition, petitioner filed a motion to restrain collection.

A hearing was conducted in this case in Washington, DC. Petitioner and counsel for respondent appeared at the hearing and presented argument in respect of the pending motions.

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[3] At the time the petition was filed, petitioner resided at Lewiston, NY

Discussion

This Court's jurisdiction to redetermine a deficiency depends upon the issuance of a valid notice of deficiency and a timely filed petition. Rule 13(a), (c); Monge v Commissioner [Dec 45,827], 93 TC 22, 27 (1989); Normac, Inc v Commissioner [Dec 44,539], 90 TC 142, 147 (1988). Section 6212(a) expressly authorizes the Commissioner, after determining a deficiency, to send a notice of deficiency to the taxpayer by certified or registered mail. It is sufficient for jurisdictional purposes if the Commissioner mails the notice of deficiency to the "last known address". See 6212(b) Frieling v Commissioner [Dec 40,2841}, 81 TC 42, 52 (1983). If a notice of deficiency is mailed to the taxpayer at the taxpayer's last known address, actual receipt of the notice is immaterial. King v Commissioner {88-2 USTC ¶ 9521], 857 F.2d 676, 679 (9th Cir. 1988), affg. [Dec 43,864] 88 TC 1042 (1987); Yusko v Commissioner [Dec 44,274], 89 TC 806, 810 (1987); Frieling v Commissioner, supra at 52. The taxpayer, in turn has 90 days from the date the notice of deficiency is mailed to file a petition in this Court for a redetermination of the deficiency. Sec. 6213(a).

Respondent mailed the notices of deficiency in this case on November 3, 1995. The petition in this case was postmarked April 24, 1996, and was filed by the Court on April 29, 1996. Given that the petition was neither mailed nor filed prior to the expiration of the 90-day statutory period for filing a timely petition, it follows that we lacked jurisdiction over the petition. Secs 6213(a), 7502; Rule 13(a), (c); see Normac, Inc v

Commissioner, supra.

The question presented is whether dismissal of the case should be premised on the petitioner's failure to file a timely petition under section 6213(a) or on respondent's failure to issue a valid notice of deficiency under section 6212. as previously indicated, petitioner contends that respondent failed to mail notices of deficiency to his last known address. We disagree.

Petitioner contends that his last known address was the Rochester address – the address listed in his tax returns for the years in issue. Although the phase "last known address" is not defined in the internal Revenue Code or in the regulations, we have held that a taxpayer's last known address is the address shown o the taxpayer's most recently filed return, absent clear and concise notice of a change of address. Abeles v Commissioner [Dec 45,203], 91 TC 1019, 1035 (1988); see King v Commissioner, supra at 681. The taxpayer bears the burden of proving that a notice of deficiency was not sent to his last known address. Yusko v Commissioner, supra at 808.

Contrary to petitioner's position, we conclude that the notices of deficiency were mailed to his last known address. Respondent mailed the notice of deficiency to petitioner at the Wilmington address – the address appearing on the petitioner's 1994 tax return, which was the last return filed by petitioner prior to mailing of the notices of deficiency. Moreover, petitioner concedes that, after filing his 1994 tax return but prior to the mailing of the notices of deficiency, he did not provide respondent with clear and concise notice that he intended for respondent to correspond with him at any other address other than the Wilmington address.

Petitioner erroneously relies on Armstrong v Commissioner [94-1 USTC ¶50,083], 15 F.3d 970 (10th Cir. 1994), affg. [Dec 48,272(M)] TC Memo 1992-328, for the proposition that his last known address is the address appearing on his tax returns for the years in issue. Specifically, Armstrong v Commissioner, supra at 974, includes a statement, consistent with the principle articulated above, that the address on the taxpayer's most recent tax return is ordinarily treated as the taxpayer's last known address. Although the court in Armstrong held that the address appearing on the taxpayer's tax returns for the years in issue constituted the taxpayer's last known address, it did so only after finding that the revenue agent had alertly discovered that the address appearing on the taxpayer's most recent tax return was nonexistent. Id. In this regard, petitioner's reliance on Armstrong is misplaced.

Petitioner also contends that respondent did not exercise reasonable diligence in ascertaining his correct address. Underlying this argument is petitioner's assumption that respondent was aware, prior to issuing the notices of deficiency, that the Wilmington address was incorrect. In particular, petitioner contends that, because he did not receive the two letters that respondent mailed to him at the Wilmington address during August and September 1995, those letters must have been returned to respondent undelivered. However, we are unable to conclude, on the record presented, that the letters in question were returned to respondent undelivered. In short, respondent has no record in her files indicating that the letters were returned undelivered, and petitioner presented no evidence to show otherwise. Under the circumstances, we are not persuaded that resondent failed to exercise reasonable diligence in ascertaining petitioner's correct address.

In accordance with the proceeding discussion, we hold that respondent mailed the notices of deficiency to petitioner at his last known address. As a consequence, we will grant respondent's motion to dismiss for lack of jurisdiction on the ground that petitioner failed to file a timely petition for redetermination and we will deny petitioner's motion to dismiss[4].

With the foregoing as background, we turn to petitioner's motion to restrain collection. Under section 6213(a), our jurisdiction to restrain the Commissioner from assessing or collecting a tax deficiency is limited to cases where "a timely petition for redetermination of the deficiency has been filed and than only in respect of the deficiency that is subject of such petition". See Powerstein v Commissioner [Dec 48,554], 99 TC 466, 471 (1992); Powell v Commissioner [Dec 47,345], 96 TC 707, 710-711 (1991). Because petitioner failed to file a timely petition for redetermination, it follows that we lack the authority to restrain respondent from collecting taxes for the years in question.

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[4] Although petitioner cannot pursue his case in this Court, he is not without a remedy. In short, petitioner may pay the tax, file a claim for refund with the Internal revenue Service, and if the calim is denied, sue for a refund in Federal District Court or the US Court of federal Claims. See McCormick v Commissioner [Dec 30,391], 55 TC 138, 142 (1970)

To reflect the Foregoing

An order will be entered granting respondent's motion to dismiss for lack of jurisdiction, denying petitioner's motion to dismiss for lack of jurisdiction, and denying petitioner's motion to restrain collection.

BILL OF RIGHTS
to the
CONSTITUTION OF THE UNITED STATES

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure
Pleadings and Motions

Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties.

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements.

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits.
Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

PLEADINGS AND MOTIONS - Rule 12.

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings

(a) When Presented.
(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer
(A) within 20 days after being served with the summons and complaint, or
(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.
(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer with 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.
(3)
(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the

complaint or cross-claim - or a reply to a counterclaim - within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim - or a reply to a counterclaim - within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters the periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trail on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: **(1)** lack of jurisdiction over the subject matter, **(2)** lack of jurisdiction over the person, **(3)** improper venue, **(4)** insufficiency of process, **(5)** insufficiency of service of process, **(6)** failure to state a claim upon which relief can be granted, **(7)** failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion For More Definite Statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion.

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, proper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a) or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

JUDGMENT - Rule 56.

Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days fiom the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense
Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.
Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

TITLE 26 – Internal revenue Code -- Subtitle F

Chapter 64 -- Subchapter A

Sec. 6303. - Notice and demand for tax

(a) General rule:

Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

(b) Assessment prior to last date for payment:

Except where the Secretary believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date

Chapter 64 -- Subchapter C

Sec. 6320. - Notice and opportunity for hearing upon filing of notice of lien

(a) Requirement of notice

(1) In general

The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice

The notice required-under paragraph (1) shall be -

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail to such person's last known address, not more than 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms -

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals; and

(D) the provisions of this title and procedures relating to the release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.

(4) Coordination with section 6330
To the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330.

(c) Conduct of hearing; review; suspensions
For purposes of this section, subsections (c),
(d) (other than paragraph (2)(B) thereof), and
(e) of section 6330 shall apply

Chapter 64 -- Subchapter D

Sec. 6330. - Notice and opportunity for hearing before levy

(a) Requirement of notice before levy

(1) In general
No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice
The notice required under paragraph (1) shall be -
(A) given in person;
(B) left at the dwelling or usual place of business of such person; or
(C) sent by certified or registered mail, return receipt requested, to such person's last known address; not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice
The notice required under paragraph (1) shall include in simple and non-technical terms -

(A) the amount of unpaid tax;
(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and
(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth -
(i) the provisions of this title relating to levy and sale of property;
(ii) the procedures applicable to the levy and sale of property under this title;
(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;
(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and
(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing

In the case of any hearing conducted under this section-

(1) Requirement of investigation The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing

(A) In general

The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including -

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination

The determination by an appeals officer under this subsection shall take into consideration -

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded

An issue may not be raised at the hearing if -

(A) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(B) the person seeking to raise the issue participated meaningfully in such hearing or proceeding.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing

(1) Judicial review of determination

The person may, within 30 days of a determination under this section, appeal such determination -

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

(2) Jurisdiction retained at IRS Office of Appeals

The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding –

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations

(1) In general

Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal

Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Jeopardy and State refund collection

If -

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy; or

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund, this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

Chapter 76 -- Subchapter B

Sec 7421 - Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary

No suit shall be maintained in any court for purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of-

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any tax.

Chapter 76 -- Subchapter E

Sec. 7491. - Burden of Proof

(a) Burden shifts where taxpayer produces credible evidence

(1) General rule

If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2) Limitations

Paragraph (1) shall apply with respect to an issue only if-

(A) the taxpayer has complied with the requirements under this title to substantiate any item;

(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in in section 7430(c)(4)(A)(ii).

Subparagraph (C) shall not apply to any qualified revocable trust (as defined in section 645(b)(1)) with respect to liability for tax for any taxable year ending after the date of the decedent's death and before the applicable date (as defined in section 645(b)(2)).

(3) Coordination

Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specfic burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers

In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(C) Penalties

Not withstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

Administrative Procedure Act

TITLE 5 - Part 1 -- CHAPTER 7

Sec. 706. - Scope of review
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency actions. The reviewing court shall-
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be-
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trail de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Exhibit 4 – Petitioner's Complaint Pgs 90a – 93a

Fax Transmission
Verification that a 4 page
letter was sent and
received at the IRS Office
(Fax No. 1-336-378-2153)
in Greensboro, NC at 08:59
on 22 August 2002

USPS Certified Mail
Confirmation Receipt
(0301 0120 0001 0356 5054)
that a letter was sent to
Ms Catherine Kendell
320 Federal Building
Greensboro, NC 27401
by priority mail

Warren R. Follum PO Box 5774 Raleigh, NC 27650
919-522-5689

21 August 2002

TO: Ms. Catherine Kendall
Tax Advocate Service
320 Federal Building
Greensboro, NC 27401
(F) 336-378-2153, (H) 336-378-2159

RE: Application for Taxpayer Assistance Order - Form 911

Dear Ms Kendall:

On 4 June, I mailed to you and to the IRS District Compliance Manager a complaint regarding civil damages: (a) for failure to release a lien pursuant IRC § 7432; (b) for unauthorized collection activities pursuant IRC § 7433; (c) for unauthorized disclosure of return information pursuant IRC § 7431. Since this complaint, I have received from Mr. Charles Little in the IRS District Office in Greensboro a Notice of Federal Tax Lien Filing and Your Rights to a Hearing pursuant § 6320, (Notice attached) along with a Notice of Tax Lien. Pursuant to § 6320 notice all collection activity is to be suspended. I discussed this matter with you early this week and you referred me to Bobby Smith in the District Office. Ms Smith referred me to the ACS contact person. I discussed this matter with two service personnel at the ACS contact number. They in return referred me to a supervisory person, who returned my call today. The supervisory person I spoke with was Ms Pamayo (ID # 1801689). I explained to Ms Pamayo that I have **never received the IRC § 6303(a) Notice and Demand for Payment nor the IRC § 6330 notice of a taxpayer's right to a hearing prior to the IRS pursuing any collection activities.** The IRS Restructuring and Reform Act of 1998, requires that the IRS notify the taxpayer in writing of the right to a hearing at least thirty (30) days prior to levying on any person's property or right to property, pursuant to § 6330. The lack of the IRS sending me either or both of these notices restrains the IRS from their collection activities. I also explained to Ms Pamayo that I had just received a § 6320 notice and that this clearly states that the IRS is to suspend all collection activities until ninety (90) days after the final determination of the appeal. Ms Pamayo informed me that the levy would remain in full affect and the IRS would not suspend their collection activities.

OMB No. 1545-1504

Department of the Treasury- Internal Revenue Service

Taxpayer Advocate	Application for Taxpayer Assistance Order (ATAO)	Form **911** (Rev. 3-2000)

Section I. Taxpayer Information

1. Names(s) as Shown on tax return Warren R. Follum	4. Your Social Security Number	6. Tax Form(s) 1040
2. Current mailing address (no., street & apartment no.) P.O. Box 5774	5. Social Security No. of Spouse	7. Tax Period(s) 1990, 1991, 1992 & 1993

3. City, Town or Post Office, State and zip code Raleigh, NC 27650-5774	8. Employer Identification No 9. E-mail address
11. Person to Contact Warren Follum	10. Fax Number
12. Daytime telephone number 919-522-5689	13. Best time to call 7:00am to 9:00pm

14. Please describe the problem and the significant hardship it is creating. (If more space is needed attch additional sheets.)

1. I never received the IRC section 6303(a) Notice and Demand. Therefore, the IRS is barred from attempting to collect disputed taxes by any other means other than court action.

2. I never received the IRC section 6330 Notice and opportunity for hearing before levy. Therefore, the IRS cannot pursue any levy action until the IRS provides the 6330 Notice.

3. I received IRC section 6320 Notice & Opportunity for Hearing upon filing notice of lien. Return date to

request the hearing is 13 September 2002(Notice attached). Therefore, levy actions by the IRS are suspended during the appeal period pursuant IRC section 6330(e), Suspension of Collections.

15. Please describe the relief you are requesting (if more space is needed, attach additional sheets)

I am requesting that the IRS suspend all collection activities until the appeal final determination.

I understand that Taxpayer Advocate employees may contact third parties in order to respond to this request and I authorize such contacts to be made. Further, by authorizing the Taxpayer Advocate Service to contact third parties, I understand that I will not receive notice, pursuant to section 7602(c) of the Internal Revenue Code, of third parties contacted in connection with this request.

16. Signature of taxpayer s/Warren Follum	17. Date 21 Aug 02	18. Signature of taxpayer	19. Date

Section II. Representative Information (if applicable)

NOT APPLICABLE

Cat. No. 16965S

Form **911**
(rev. 3-2002)

Exhibit 4 - Petitioner's Reply Pgs 94a - 99a

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

CHIEF COMMUNICATIONS
AND LIAISON

Date: July 19,2001

Warren R. Follum
P.O. Box 5774
Raleigh, North Carolina 27650-5777

Dear Mr. Follum:

This is in response to your Freedom of Information Act (FOIA) request dated March 27, 2001 and received in this office on March 30,2001 , pertaining to you, for the years 1990,1991,1992 and 1993.

In item 1. you requested a copy of the envelope that was used to send a Statutory Notice of Deficiency during November 1995. I am enclosing a copy of the requested envelope and contents consisting of 28 pages.

In item 4, you requested the envelope that was used to send the **"26 USC section 6303 Notice"** for the years 1990 through 1993. We searched all applicable years and located one returned envelope. We are enclosing a copy of that envelope and a copy its contents for a total of four pages. The FOlA does not require this office to make a determlnatin as to what statute is apphcable.

In item 5, you requested a certified copy of Form 4320 (or Certificate of Assessments and Payments) for the years 1990 through 1993. We determined that you are asking for the form 4340 since we can not find a listing for a form 4320. Form 4340 is a manually prepared document most often used in judicial proceedings.

Because the enclosed transcript from the Individual Master File (IMF), consisting of 27pages, represents a copy of the record of assessment, we are providing the transcript in lieu of a Form 4340. The transcript includes the taxpayer name, the taxable period, the assessment dates and amounts, and the character of the assessment as required by IRC 6203 and Regulation 301.6203.

Forms 4340 are under the jurisdiction of the Internal Revenue Service Centers. If you would like a copy of any existing Forms 4340, which pertain to you, you may submit a FOIA request to the Atlanta Service Center, Attn: Disclosure Officer. Please note that the FOIA does not require an agency to create documents not already in existence.

If you would like to have a Form 4340 created, you may submit a specific, written request under IRC 6203 to the Atlanta Service Center, Attention Accounting Branch, Post Office Box 93, Doraville, GA 30362. Separate certifications are made for each document, which normally has an independent identity and for each taxable period involved. Payment of certification fees, which are computed at $1 per document or tax period, should be submitted with your request.

We are enclosing a total of 59 pages responsive to your request. We are not denying any records and there is no processing charge.

If you have any questions, please contact M. Wright, ID# 56-688688, 336-378-2496, North-South Carolina Disclosure Office, 320 Federal Place, Room 409, Greensboro, NC 27401. Please refer to case # 56-2001 -00786.

Sincerely yours,

S/ R.L. Commerson

R. L. Commerson
Disclosure Officer
58-688338

Enclosures

Internal Revenue Service
Memphis, TN 37501

Official Business
Penalty for Private Use, $300

First Class Mail
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FOLL673 284061009 1296 4/12/96
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RETURN TO SENDER

972

§ 6303(a) Notice and Demand Letter pgs 98a – 99a

Department of the Treasury
Internal Revenue Service
MEMPHIS, TN 37501

Date of this notice:
APR 8 , 1996
Taxpayer Identifying
Number
Form: 1040 Tax
Period:
Dec. 31, 1990

1ll,1111111ll11ll1,llllllllll1*1l*1*1lilll*llllllllllllll*1lilli

WARREN R FOLLUM
PO BOX 3673
WILMINGTON NC 28406- 0673734

For assistance you' may
call us at:
1-800-829-8815
CALLER ID: 794269

WE CHANGED YOUR ACCOUNT

THE CHANGE(S) BELOW RESULTED FROM AN EXAMINATION OF YOUR TAX RETURN SHOWN ABOVE. PLEASE SEE YOUR COPY OF THE EXAMINATION REPORT FOR A DETAILED EXPLANATION OF THE CHANGES.

IF YOU HAVE ANY QUESTIONS, PLEASE CALL US AT THE NUMBER LISTED ABOVE.

STATEMENT OF ACCOUNT

ACCOUNT BALANCE BEFORE EXAMINATION ACTION ....NONE

INCREASE IN TAX BECAUSE OF EXAMINATION ACTION	$ 4,107.00
INTEREST CHARGED	$ 2,114.65

AMOUNT YOU NOW OWE	$6,221.65

YOU MAY AVOID ADDITIONAL INTEREST AND PENALTIES IF YOU PAY THE AMOUNT YOU OWE BY APR. 18, 1996. PLEASE MAKE YOUR CHECK OR MONEY ORDER PAYABLE TO THE INTERNAL REVENUE SERVICE. WRITE YOUR SOCIAL SECURITY NUMBER ON YOUR PAYMENT AND RETURN IT WITH THE STUB AT THE END OF THIS NOTICE. AN ENVELOPE IS ENCLOSED FOR YOUR CONVENIENCE. THANK YOU FOR YOUR COOPERATION.

PAGE 1